INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute and Constitutional Provision Involved	3
Statement	4
Summary of Argument	7
Argument:	
I. The standard of strict arithmetical equality in Congressional Districts, enunciated in *Kirkpatrick* v. *Preisler*, ought to be reconsidered and revised	10
Introductory	10
A. The strict arithmetical equality rule of *Kirkpatrick* is substantively in error	13
1. The rationale of *Wesberry* v. *Sanders* supports only a requirement of reasonable approximation to equality among Congressional Districts	13
2. The nature of the data on which the exact arithmetical standard can operate is such as to make that standard instrumental to no stateable end. Constitutional law does not command purposeless actions	25
(a) The figures upon which the exact arithmetical requirement can operate are so uncertainly related to equality in number of voters at the time of their voting as to make that requirement itself a mere futility	26
(b) It is the consensus among virtually all serious thinkers on the subject that "fair and effective representation" is related only loosely to exact population equality among constituencies	42

Page

3. Subpoints 1 and 2 are interconnected 44

B. There are discernible no factors extrinsic to the merits that can protect *Kirkpatrick* from modification. On the contrary, great harm seems to flow from the requirement of arithmetical exactness 47

C. This Court might warrantably select a stated percentage of variation permissible without inquiry, as a plainly needful remedial device ... 61

II. *Kirkpatrick* v. *Preisler* may sensibly be distinguished from the present case 65

A. The issue of "good faith" presents itself here in a setting altogether different from that in *Kirkpatrick*, since there were in that case clear and specific findings of "bad faith" in the most classic sense, while nothing of the sort exists here 66

B. The sole "justification" needed here is respect for county integrity. *Kirkpatrick*, on its facts, cannot have decided this issue finally, for the *Kirkpatrick* county-line defense was known by this Court to be sham 71

Summary on II 79

III. Whatever the view taken on the preceding points, the judgment below must be reversed, since there was no conceivable warrant for the adoption of plaintiffs' Plan C 81

Conclusion 87

TABLE OF AUTHORITIES

Cases:

Avery v. *Midland County*, 390 U.S. 474 (1968) 78

Baker v. *Carr*, 369 U.S. 186 (1962) 33, 43 56, 57, 60, 68

Brown v. *Maryland*, 12 Wheat. (25 U.S.) 419 (1827) .. 13

Burns v. *Richardson*, 384 U.S. 73 (1966) 42

Page

Carrington v. *Rash*, 380 U.S. 89 (1965) 40

Connor v. *Williams*, 92 S. Ct. 656 (1972) 49

Crandall v. *Nevada*, 6 Wall. (73 U.S.) 35 (1868) 13

Davis v. *Mann*, 377 U.S. 678 (1964) 48

Dunn v. *Blumstein*, 405 U.S. 331 (1972) 40, 62

Ely v. *Klahr*, 403 U.S. 108 (1971) 49

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938) ... 50

Fairchild v. *Hughes*, 258 U.S. 126 (1922) 56

Frothingham v. Mellon, 262 U.S. 447 (1923) 56

Jackson v. *The Steamboat Magnolia*,
20 How. (61 U.S.) 296 (1857) 49

Kilgarlin v. *Hill*, 386 U.S. 120 (1967) 79

Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) ..... *passim*

McCulloch v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819). 13

Moragne v. *States Marine Lines, Inc.*,
398 U.S. 375 (1970) 47, 48, 49

Reynolds v. *Sims*, 377 U.S. 533 (1964) 43, 62

Swann v. *Adams*, 385 U.S. 533 (1964) 48

The Thomas Jefferson, 10 Wheat. (23 U.S.) 428 (1825). 49

U.S. v. *37 Photographs*, 402 U.S. 363 (1971) 62

Wesberry v. *Sanders*, 376 U.S. 1 (1964) ..... *passim*

Whitcomb v. *Chavis*, 403 U.S. 124 (1971) 49, 54

David v. *Cahill*, 342 F. Supp. 463 (D.N.J. 1972) 59

Page

Donnelly v. *Meskill*, 345 F. Supp. 962 (D. Conn. 1972) 57, 59

Drum v. *Scott*, 337 F. Supp. 588 (M.D.N. Car. 1972) .. 57

Dunnell v. *Austin*, 344 F.Supp. 210 (E.D. Mich. 1972) .. 59

The Gratitude, 42 F. 299 (S.D.N.Y. 1890) 63

Preisler v. *The Secretary of State of Missouri*, 279 F. Supp. 952 (1967) 66, 67, 75, 85

Prince v. *Kramer* (W. D. Wash., Civil No. 9668, April 21, 1972) 57, 59

Skolnick v. *State Electoral College Board of Illinois*, 336 F. Supp. 839 (N.D. Ill. 1971) 59

Legislature v. *Reinecke*, 6 C. 3d 475, 101 Cal. Rep. 552, 496 P. 2d 464 (1972) 59

DaCosta v. *Newnham* (1788) Term Reports 407 (King's Bench) 62

Fenwick v. *Robinson*, 3 Car. R. P. 323 (King's Bench 1828) 63

Constitution and Statutes:

Constitution of the United States, Article I, Section 7.. 45

Constitution of the United States, Article I, Section 2 ..... *passim*

1st Session 2d Congress, C. 23, 1 Stat. 253 20

28 U.S.C. § 2101(b) 2

28 U.S.C. § 1343 2

28 U.S.C. § 1253 2

28 U.S.C. § 2281 2

Senate Bill One, Tex. Acts, 62d Leg., 1st C.S. 1971, ch. 12, p. 38 ..... *passim*

Page

Miscellaneous Authorities:

Alterman, COUNTING PEOPLE (1969) 16, 27

Benedict, ADMIRALTY (6th ed. 1940) 64

Bollens, AMERICAN COUNTY GOVERNMENT (1969) 77

Bureau of the Census, THE MATERIALS AND METHODS OF DEMOGRAPHY (1971) 37

Bureau of the Census, CONGRESSIONAL DISTRICT DATA: DISTRICTS OF THE 93d CONGRESS (Pamphlets for the separate States) . 21, 28, 29, 31, 39

Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, 1961 35

Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, 1971 35

Chorley and Bailhache, THE LAW OF MARINE INSURANCE AND AVERAGE (1961) 63

Chute, THE FIRST LIBERTY (1969) 18

CONGRESSIONAL RECORD, Vol. 118 77

Cortner, THE APPORTIONMENT CASES (1970) 60

Dixon, DEMOCRATIC REPRESENTATION (1968) 23, 24, 25, 43, 54

Dixon, *The Warren Court Crusade for the Holy Grail of "One Man—One Vote"*, 1969 SUPREME COURT REVIEW 219 64

Duncombe, COUNTY GOVERNMENT IN AMERICA 77, 78

Farrand (ed.) RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937) ..... *passim*

FEDERALIST, No. 54 18

Grant and Nixon, STATE AND LOCAL GOVERNMENT IN AMERICA (1963) 77, 78

Page

Heer (ed.), SOCIAL STATISTICS AND THE CITY (1968) .. 28

Mayer (ed.), AUSTRALIAN POLITICS, A READER (2d ed. 1967) 24

Muskie, *Congress and the Counties*, 31 American County Government 77

Note, 15 VILLANOVA L. REV. 223 (1969) 68

Office of the Governor [of Texas], Office of Information Services, SUMMARY, SELECTED DEMOGRAPHIC CHARACTERISTICS FROM CENSUS DATA—FOUKTH COUNT (1972) 29

Pennock and Chapman (eds.) REPRESENTATION (1968) . 42

Rawson, AUSTRALIA VOTES (1961) 24

Rossiter, 1787: THE GRAND CONVENTION (1966) 16

Siegel, *Some Aspects of the Methodology of Population Forecasts in U.N.*, World Population Conference, 1954 (Rome) Vol. III, pp. 113-133 (1955) 38

Spiegelman, INTRODUCTION TO DEMOGRAPHY (1968) ... 37

Stewart, YOUR 1970 CENSUS (1969) 18, 20

TEXAS ALMANAC 1972-1973 ..... 35, 39, 69

Wechsler, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961) 50

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1623

BOB BULLOCK, *etc.*,

Appellant

v.

DAN WEISER, *et al.*,

Appellees

On Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

APPELLANT'S BRIEF ON THE MERITS

CRAWFORD C. MARTIN
Attorney General of Texas
SAMUEL D. MCDANIEL
Staff Legal Assistant
P. O. Box 12548
Austin, Texas 78711
CHARLES L. BLACK, JR.
169 Bishop Street
New Haven, Connecticut 06511

December 1972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1623

BOB BULLOCK, *etc.*,

Appellant

v.

DAN WEISER, *et al.*,

Appellees

On Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

APPELLANT'S BRIEF ON THE MERITS

OPINION BELOW

The opinion and orders of the District Court for the Northern District of Texas are not yet reported. The opinion and orders are attached to the appellant's Jurisdictional Statement as Appendix A. The order of this Court staying the said judgment, on application by appellant to Mr. Justice Powell, by him referred to the Court, is reported at 404 U.S. 1065, 92 S. Ct. 750 (January 27, 1972). This Court's denial of the motions of appellees to advance and expedite and to dispense with printing is reported at 405 U.S. 912, 92 S. Ct. 928 (February 22, 1972).

JURISDICTION

The action below was brought to enjoin the enforcement of a statute of the State of Texas, Senate Bill One, Tex. Acts, 62d Leg., 1st C. S. 1971, ch. 12, p. 38, and jurisdiction of the three-judge District Court below was invoked under Title 28 of the United States Code, Sections 1343 and 2281. The jurisdiction of this Court to review on appeal the judgment of the District Court is founded on 28 United States Code, Sections 1253 and 2101(b).

This Court noted probable jurisdiction on October 24, 1972.

QUESTIONS PRESENTED

1. Whether the requirement of near-exact arithmetical equality in Congressional District populations, as set out in the case of *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), ought to be revised, so as to recognize a reasonable latitude sufficient to cover the small variations in this case (either with or without a stated definite percentage of such permitted latitude).

2. Whether, if the rule of *Kirkpatrick* be not modified, that case can sensibly be distinguished from the present case, on the grounds that positive *mala fides* was proved and found in *Kirkpatrick* and that the county-integrity justification in that case was known to be sham.

3. Whether the court below (even assuming a negative answer to each of the above questions) acted improperly and without warrant of law in ordering into effect the districting plan it incorporated into its opinion "as the plan of this Court for the congressional districts of the State of Texas . . ."

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The statute involved is Senate Bill One, Tex. Acts, 62d Leg., 1st C. S., 1971, ch. 12, p. 38, a copy of which, with map and table of variations, is attached as Appendix B to appellant's Jurisdictional Statement herein.

The Constitutional provision involved is Article I, § 2, in part, as follows:

Article I.

. . . . .

"Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. . . .

. . . . .

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one,

Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."

. . . . .

STATEMENT

On June 17, 1971, the Governor of Texas signed into law Senate Bill One (Tex. Acts, 62d Leg., 1st C.S. ch. 12, p. 38, hereinafter referred to as S.B.1), a measure dividing the State of Texas into twenty-four Congressional Districts for the ensuing decennium. Summarily, this Act allowed population variations (from 1970 census count) of +2.43% for the 13th District and −1.7% for the 15th District, making a total up-and-down maximum variation of 4.1%, based on the state "ideal" district, and placing the least and most populous districts in a ratio of 1:1.04. (A. 6-7 (Plaintiffs' Complaint); A. 317) The average variation from "ideal", for all 24 districts, was .745%. (Maps and deviation tables for this and for the appellees' two submitted plans are in appellant's Jurisdictional Statement herein, at pp. 45B-49D thereof.)

On October 19, 1971, plaintiff-appellees (residents of the 6th, 13th, 16th and 19th Districts) filed their complaint (A. 1-11) against the appellant herein, Secretary of State of Texas and chief election official thereof, alleging violation of their rights under Article I of the Constitution of the United States, and the Equal Protection Clause of the Fourteenth Amendment. They asked an injunction against holding of any election under S.B.1 and an order directing the Legislature to enact a new bill, and in the event this was not done, that a plan submitted by them and appended to their complaint be ordered into effect, or, in the alternative, that an at-large election be ordered. The plan then submitted is hereinafter referred to as Plan B; a map and table of variations in this Plan are contained in appellant's Jurisdictional Statement herein, at pp.

46C-47C. These maps show that Plan B differs from S.B.1 in that Plan B cuts some eighteen counties more than that Act.

Appellant's answer in effect denied violation of appellees' rights by S.B.1. A three-judge district court was convened to hear the case. On January 22, 1972, Van Henry Archer, designated in his complaint-in-intervention as "duly elected Chairman of the Bexar County Republican Party," and others, filed a complaint-in-intervention, joining appellees in their general position, but proposing another Plan, containing a deviation "of only two percent" (A. 73, plaintiff-intervenors complaint).

On January 10, 1972, plaintiffs filed an amended complaint, substantially similar to their original complaint, except that another plan, hereinafter referred to as Plan C, was tendered, though Plan B was not abandoned. A map and variations for Plan C are set out in appellant's Jurisdictional Statement herein, at pp. 48D-49D.

This Plan C provided for population variances *greater* than Plan B in 14 Districts, equal to Plan B in 8 Districts, and less than Plan B in only 2 Districts, in one of these by the amount of four persons. The maximum variation of Plan C is almost exactly five times the maximum variation in Plan B (13th District).

On December 7, 1971 and January 14, 1972, a pretrial conference was held, and a pretrial order was entered wherein "Plaintiffs' Claims" were narrowed to those under Article I, the 14th Amendment claim not appearing (A. 75-76). Depositions were meanwhile being taken from persons active in the passage of S.B.1 through the Legislature (A. 80-315).

On January 21, 1972, a "trial" was held, which ac-

tually consisted of argument (A. 315-323), the case being by stipulation tried on the above-mentioned depositions.

On January 22, 1972, twelve days after the filing of appellees' amended complaint (wherein Plan C was first presented), the court below, in a three-page *per curiam* opinion, declared S.B.1 unconstitutional, enjoined elections under it, and adopted appellees' Plan C as ". . . the plan of this Court for the congressional districts of the State of Texas. . . ." The court's entire rationale for the adoption of Plan C was that it was "significantly more compact and contiguous than" the other Plans. (All Districts in all the Plans are actually contiguous.)

The District Court's decree provided for reconsideration if the Legislature devised a new plan, but the Governor refused to call a special session.

This Court granted a stay of this judgment, on January 27, 1972. (See 92 S. Ct. 750.)

There are no "findings of fact" in the opinion of the court below. Evidence taken in the cause consisted in depositions of several legislative members, two clerks, and the Lieutenant Governor, concerning the process leading to the passage of S.B.1. In the absence of "findings of fact" to which specific comment might be addressed, the upshot of this testimony is difficult to summarize without argumentativeness; appellant finds in it no probative evidence of impropriety or bad faith, and must necessarily leave to appellees the pointing-out of such evidence, if in their view it exists.

Testimony clearly shows a concern on the part of those legislators principally active in the apportionment process for the maintenance where possible of constituency-Congressman relations and of seniority

deemed valuable to the State (*E.g.*, A. 80-81, 84, 96-97, 108, 141). While the bill was pending, certain of its legislative managers went to Washington to discuss districting with Congressmen (A. 80-81, 84, 96-97, 108, 141).

There is no evidence in the testimony of any causal connection between this concern and any of the small variations from population in S.B.1. There is affirmative and unrebutted testimony to the effect that this concern had no ideological or partisan character (A. 186-7; see also 187-88, 238, 266-267). Plaintiff's plans B and C cut many more counties than does S.B.1, and there is testimonial evidence that the legislative leaders involved desired to respect county lines where possible (A. 92, see also 251, and statement of appellees' counsel on oral argument, A. 321). There is evidence that some legislators took into account a belief that the relative populousness of West Texas would probably continue to decline (A. 90, 226, 248); the three districts showing more than 2% variance are in that section.

The record contains no evidence concerning the practicality or wisdom of either of plaintiffs' submitted plans, including Plan C, the one adopted by the court below; almost all the testimony in the case had been taken before Plan C first appeared in appellees' Amended Complaint; appellees did not, at the January 21 "trial", advocate adoption of Plan C, or even mention it, but rather advocated the adoption of their Plan B (A. 317 (twice), 319 (twice), 321, 322).

SUMMARY OF ARGUMENT

The case of *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), the sole authority relied on by the court below in invalidating this Congressional districting plan,

laid down a standard of strictest arithmetic equality in Congressional district populations, attributing to small variations a decisive constitutional significance. Appellant's first and principal contention will be that the substantive constitutional law of Congressional districting does not support the attribution of significance to small variations such as those found in the present case, and that the rule of *Kirkpatrick* ought to be modified, not by introducing a *de minimis* concept applicable to substantive constitutional violations, but by recognition that the substantive law of Congressional districting cannot find any violation at all when very small variations are shown.

The historical evidence affirmatively and unambiguously shows that the Framers, concerned as they were with substantial and approximate proportionality of constituencies to representatives, were unconcerned with precise arithmetical equality. The federal plan for Congress—on analogy with which the leading Congressional district case, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), was decided—cannot serve as the foundation for any analogic or implicational argument leading to the requirement of arithmetical exactness, for it does not itself seek that goal, and never has. That requirement, moreover, is a requirement that a futile thing be done, since the nature of the data—arithmetical and political—upon which the exact-equality requirement can operate results in there being no reliable correlation at all between small census-count variances and either voting power narrowly considered, or fair and effective representation.

On the substantive merits, therefore, *Kirkpatrick* goes too far. There are present none of the factors which may protect an erroneous precedent from modification. *Kirkpatrick* ought therefore to be modified, to

the extent of allowing a reasonable leeway to state districting bodies. Appellant will further suggest that this Court might warrantably select, as a plainly needful remedial convenience, a fixed percentage of variation from census-count equality, permissible without inquiry (except, of course, for inquiry into violation of separate constitutional norms such as the command against racial discrimination).

At the same time, appellant will urge that, if *Kirkpatrick* is to stand unmodified, this case may sensibly be distinguished from *Kirkpatrick*. In *Kirkpatrick*, the issue of "good faith" came up in a context of specific findings, supported by evidence, of "bad faith" in the central sense of that phrase—intentional and stubborn perpetuation of overrepresentation for a given interest. Nothing of the sort is found here. In *Kirkpatrick*, the county-integrity justification was a proven sham; here, it is not shown or suggested to be anything but *bona fide*, and this case should not be held to be ruled by words spoken in a case where that defense was known to be sham.

Finally, even if all the foregoing contentions be rejected, appellant will contend that this case must be reversed, because the relief awarded was wrong on the merits and was chosen after a process of consideration well below the standard that ought to be set. After the court below had determined that the Legislature's plan was to be held invalid, it should have invited proposals for relief, from defendants and from the public. Even if it were proper for the court to limit its choice of relief to plans previously submitted by plaintiffs, the court should have chosen the one that most closely followed the Legislature's determinations, which was also the only plan the plaintiffs below had urged be adopted, and which actually had smaller population variations

than the plan chosen. Instead, the court, without adequate notice or consideration, decreed a plan radically disregarding the Legislature's determinations, even where these could constitutionally have been followed.

ARGUMENT

I.

The standard of strict arithmetical equality in Congressional districts, enunciated in Kirkpatrick *v.* Preisler, *ought to be reconsidered and revised. Appellant's submission is that that standard is not warranted by the substantive law of Congressional districting, and is (as the present case itself illustrates) productive of a highly undesirable involvement of the national judicial branch in the details of the districting process. The rationally derivable substantive law of Congressional districting should be held to contain a term of reasonable latitude, within which the Texas Legislature's plan in this case evidently falls; this Court, moreover, might appropriately set up, as a plainly needful remedial convenience, a fixed standard of permissible deviation from equality of census figures.*

Introductory

The maximum deviations in the Legislature's districting plan in this case (Senate Bill One) are 2.43% over and 1.7% under; the highest and lowest districts stand in a ratio of 1:1.04; the average deviation is .745%—all calculated on the census count of April 1, 1970. So close a fit can be condemned only under a rule of the strictest arithmetical equality in census population—a rule associated with the case of *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969). Appellant will submit

(in Point II hereof) that a reading of the *Kirkpatrick* case is possible (and desirable, if the holding is to stand) which would take the case at bar out of the *Kirkpatrick* rule. On any reading, however, *Kirkpatrick* attributes very large and often decisive significance to quite small district inequalities. It is appellant's submission at this point that this attribution is not warranted by law, and that *Kirkpatrick* ought at this time to be receded from by a short distance.

Appellant is *not* contending here for the indulgence of a *de minimis* rule with respect to established substantive violation of constitutional rights. Appellant rather contends that, on full reconsideration, the *substantive constitutional law* of Congressional districting ought to be held to be such that a plaintiff who shows a few percentage points variation among districts has not thereby made out any substantive case of violation of his constitutional rights.

The contention that the *Kirkpatrick* rule should be modified will be supported by the following arguments:

A. *On the merits,* Kirkpatrick *is in error, as to its exact arithmetical standard.*

1. The underlying and expressed rationale of *Wesberry* v. *Sanders,* 376 U.S. 1 (1964) the leading and rationally definitory case on Congressional districting, reaches to support of a doctrine of approximate and reasonable equality in district census populations but not to support of a doctrine of close arithmetical equality.

2. The insistence upon tight arithmetical equality is futile, being instrumental to no comprehensible end, for two broad reasons:

(a) The nature of the numerical data, upon

which alone the doctrine of tight arithmetical equality can operate and be meaningful, is such as to make that doctrine meaningless as a protection against *dilution or debasement of the vote*, the evil sought to be prevented by the apportionment decisions, so that the command of exact arithmetical equality is a command that an idle or at most an unclearly and ineffectively symbolic thing be done, at great trouble and cost to real and substantial values.

(b) The relations between voting strength and political influence and power are highly complex and indirect; though this Court probably ought not to elaborate and impose an orthodox theory of "representation" (there appearing to be no warrant in law for such elaboration and no authoritative scientific or philosophic corpus to which law may look for supplying one) the requirement of numerical equality in constituency numbers ought to be tempered by an awareness that such equality bears only a rough relation to the goal of fair and effective representation, while some small flexibility as to numerical equality may confer on legislators, or on any other authorities undertaking constituency-formation, a corresponding freedom to experiment and to give weight to other factors affecting representation.

3. The above Points 1 and 2 are interconnected, and reinforce one another.

B. *There are present none of the factors (such as action in reliance, the accrual of vested rights, or the repeated and matured consideration exhibited by a long line of authority) that legitimately may protect*

from overruling or modification a precedent judged erroneous; on the other hand, the Kirkpatrick *rule is by no means evidently innocuous, but seems to be productive of considerable political harm, so that the case's rule of strict arithmetical equality, if erroneous, ought at this time to be modified.*

C. *As a matter of remedy, this Court might legitimately select a numerical standard of permissible variation, thus clarifying for legislatures the requirement under which they operate, and (in high probability) greatly diminishing the flow of districting and apportionment cases to the courts.*

A. The strict arithmetical equality rule of Kirkpatrick is substantively in error.

1.

The rationale of Wesberry *v.* Sanders *supports only a requirement of reasonable approximation to equality among congressional districts.*

There is nothing in the Constitutional text about Congressional districting. Like many other important constitutional doctrines now of unquestioned acceptance (see, *e.g.*, *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819); *Brown* v. *Maryland*, 12 Wheat. (25 U.S.) 419 (1827); *Crandall* v. *Nevada*, 6 Wall. (73 U.S.) 35 (1868), the doctrine of *Wesberry* v. *Sanders* had to be rested, and was quite explicitly rested, on *implication*—in this case implication from the State-representation plan that *is* ordained by the Constitution—the implication being validated by reference to utterances from the time of the formation of the Constitution, and being used, in turn, to give concrete meaning to the intrinsically ambiguous phrase, ". . . chosen . . . by the People. . .", Constitution, Article I,

§ 2. These three strands of argument—the implica-tional, the historical and the textual—intertwine and reinforce one another. Together, they fully support the holding in *Wesberry*, which was, on the facts, that "*gross*" disproportion of population in Congressional districts, with "*widely varied* numbers of inhabitants", violates the Constitution, 376 U.S. at 7, 8 [Emphasis supplied]. Such disproportion is functionally inharmonious with the federal scheme for construction of the popular branch of Congress, utterances around 1787 by responsible persons (found both in the *Wesberry* majority opinion, 376 U.S. at 11-18, and in Mr. Justice Harlan's dissenting opinion, 376 U.S. at 31-41) show that such persons would in all probability have regarded as abusive such maldistricting as *Wesberry* condemned; given these facts, election on the basis of grossly disproportionate districts may be said not to be election ". . . by the People", within the fair meaning of the Constitutional text. But none of these three strands of argument, nor all together, can support a rule of very strict arithmetical equality among districts.

There was little discussion of equality in districting at the Constitutional Convention, since districting is not even a constitutional requirement and it was never suggested that it be made such. The form of inference as to the Framers' intent must then be that equality among districts is a requirement somehow connected with the requirement of population proportionality among the States in respect of their Congressional representation. (The *Wesberry* Court clearly recognized this, condemning the plan before it as one which would "cast aside" and "defeat" the principle of the federal plan, 376 U.S. at 8, 14.) It is crucial therefore (unless the inference is to rise higher than its source) to ask

what the Framers meant when they agreed upon Congressional representation proportioned to the number of inhabitants as amongst the States. Did they mean very tight arithmetical equality, or did they mean a reasonable approximation to equality?

By far the most reliable document for registering the intent of the Framers is the Constitution itself. The text of Article I, § 2, goes a long way toward establishing an insistence on what was in those times looked on as substantial equality, coupled with an indifference to very tight arithmetical proportionality. Here may be listed:

(1) The inclusion of three-fifths of the voteless and voiceless slaves in the population count. This decidedly skewed, though it did not destroy, proportionality amongst constituent populations.

(2) The provision for no oftener than *decennial* enumeration (and, inferentially, apportionment) in the face of the fact that rapid growth in population in the West was plainly expected strongly to continue. I Farrand (ed.), RECORDS OF THE FEDERAL CONVENTION OF 1787, 560, 571 (rev. ed. 1937).

(3) The provision that each State should have at least one Representative, regardless of its population. The entire absence of objection to this provision shows how little concerned the Framers were with exact proportionality.

(4) The employment of the formula, "The Number of Representatives shall not exceed one for every thirty thousand . . .", a rough-and-ready prescription hardly consonant with concern about exact proportionality.

(5) The interim apportionment actually made, State by State, in Article I, § 2, an apportionment which cannot have been thought by anyone to be more than roughly proportional to numbers. "These numbers were worked out by two committees, whose members made population (at which they could only guess) the principal criterion, but also gave some weight to wealth and apparent rate of growth." Rossiter, 1787: THE GRAND CONVENTION 186 fn. (1966). The Convention had estimates of population available, but it departed quite substantially from even the representative proportions indicated by these. Massachusetts, *e.g.*, would have had 9.1 representatives out of the 65, on a strict population basis resting on the estimates, but actually got 8. South Carolina was entitled to 3.8, on an arithmetical basis, but got 5. "It is obvious that, while mathematics played a part, it was not the source of all decisions." Alterman, COUNTING PEOPLE, 187-189 (1969). Is it so much as possible that those who did this would be concerned with arithmetical exactness as to district populations?

(6) The apportioning of Representatives State by State, with no overlapping or sharing. This was not strictly necessary; it would have been entirely possible to make provision for the sharing of a representative, or for districts overlapping State lines, a step which would have made possible an enormously closer approximation to population equality. That such a step was never thought of shows how far the Framers were from regarding exact arithmetical equality as a prime value. (To the modern mind, accustomed to the idea of discretely separate state identity, the sharing ar-

rangement may seem unthinkable. But the Framers' conceptions were not necessarily thus confined. For example, it was actually suggested, by Brearly of New Jersey, that State boundaries be totally redrawn, to equalize numbers, I Farrand (ed.), RECORDS OF THE FEDERAL CONVENTION OF 1787, 177 (Rev. ed. 1937); no less a personage than Franklin endorsed this scheme in principle, I *ib.* 199. In the end it got nowhere, but the fact that it could be put forward at all shows how radically the delegates were capable of thinking. Had the sharing of representatives been instrumental to any end they cared about in the least, that sharing might well have been suggested.)

To these textual points may be added the underlying fact, against which § 2 must be read, that tight arithmetical proportionality of representation to population was quite impossible unless a very large House of Representatives was to be brought into being, a step evidently not contemplated. (Madison, indeed, moved to double the numbers in the first apportionment, State by State, but this would not have produced a closer fit of representatives to population. It is, in fact, highly significant that Madison, believing the House should be larger, did not so much as notice that that enlargement could have been made the means of producing closer proportionality. Instead, he moved a mere doubling, State by State. In the debate on the motion, the proportionality problem was not mentioned. In any case, the motion lost, 9-2. I Farrand, *op. cit. supra*, 568-570.)

It must also be noted that, insofar as proportionality is tied to *voting*, or to the dilution of the *vote*, the whole structure of Section 2 evidences very plainly a lack of concern for exact equality; the proportionality or-

dained, rough as it was, was based on *population*, while the matter of eligibility to vote was left to the States, and criteria varied widely. Chute, THE FIRST LIBERTY, *passim* (1969) Even exactly similar rules of eligibility could result in different proportions of voters in equal populations; one constant requirement, *e.g.*, was male suffrage, but the First Census shows significant variation in male-female ratios among the States. Vermont, *e.g.*, had nearly 45,000 free white males, and only some 40,500 free white females, while Connecticut had around 115,000 males and 117,000 females. Stewart, YOUR 1970 CENSUS 5 (1969).

Further, and tellingly, there was never a final agreement amongst the Framers as to whether even population was being used for its own sake or as a parameter for wealth. This double functioning of the population standard is very clear in the debates of July 11-13, in the course of which no fewer than five delegates (Mason, Sherman, Madison, Gorham, Johnson) made the point that population rather accurately measured wealth, an argument which made it possible for population to be agreed upon as a proper basis by both sides in the population-wealth debate. I Farrand, *op. cit. supra*, 579, 582, 585, 587, 593. See also FEDERALIST No. 54.

Nothing in the debates or other records fails to chime with the conclusion that the Framers cared a great deal about approximate or substantial proportionality of representatives to numbers, but not at all about arithmetically exact proportionality. The utterances collected in the opinions of *Wesberry* v. *Sanders* fully bear out this statement; interest is there shown to have centered on avoiding the "vicious representation" of Britain, where London and Old Sarum were represented alike, with a population ratio of many thousands to one,

376 U.S. at 14-15. Not one word spoken then can fairly be taken to indicate a concern with arithmetical exactness to the *Kirkpatrick* degree of fineness.

If, then, there is no direct and explicit answer in the historical materials to the question whether arithmetically exact proportionality was of interest to the Framers, it is submitted that this is almost certainly because they never thought of such a thing. Directed to them, the question is an anachronism. All the indirect evidence, whether of deed or utterance, tends to the conclusion that they would have dismissed as quite trivial such inequalities as appear in this case, and would have been only puzzled by the assertion that these very small inequalities were interdicted by the substantive law of their Constitution. The evidence unambiguously shows that they were unconcerned about minor disproportionalities among the States, while at the same time being crucially concerned about an approximation to correct proportionality. Unless it somewhere jumps the track, an inference from their "intent" to the proprieties of district equalization must take account of both these attitudes.

It is interesting to go on and see what the Second Congress did in apportioning on the First Census of 1790, for this tells us much as to what passed for a satisfactory approximation to equality in the minds on whose intent *Wesberry* is partly rested. The following short table tells the whole story:

State	Population Adjusted to 3/5 Formula	Number of Representatives	Number of Persons per Representative
Vermont	85,532.6	2	42,766.3
N. Hampshire	141,821.8	4	35,455.4
Maine Massachusetts	475,327.0	14	33,951.9
Rhode Island	68,445.8	2	34,222.9

Connecticut	236,840.4	7	33,834.3
New York	331,590.4	10	33,159.0
New Jersey	179,569.8	5	35,913.9
Pennsylvania	432,878.2	13	33,298.3
Delaware	55,539.2	1	55,539.2
Maryland	278,513.6	8	34,814.2
Virginia	630,559.2	19	33,187.3
Kentucky	68,705.0	2	34,352.5
N. Carolina	353,522.2	10	35,352.2
S. Carolina	206,235.4	6	34,372.5
Georgia	70,842.4	2	35,421.2
Total	3,615,923.0	105	34,437.4

(Calculations show a percentage range of deviation from national "ideal" district of 0.19% to 61.28%, with a median deviation (Georgia) of 2.86% and an average deviation of 7.61%.)

(Sources: Stewart, YOUR 1970 CENSUS 5 (1969); 1st Session, 2nd Congress, C.23, 1 Stat. 253.)

Clearly, what is happening here is the roughest approximation to equality. Each state is getting a representative for each full 33,000, with no allowance for fractions. Yet there is no record of any dissatisfaction with the resultant disparities.

There is, then, virtually conclusive evidence of the propositions (1) that the Framers were deeply concerned with approximate proportionality as among the States, and (2) that they were not concerned at all with exact proportionality. There is no evidence that they would have felt differently about district equalization, nor any reason why they should.

Insofar, however, as the rationale of *Wesberry* is *implicational*—rested, that is, on an analogy with the federal plan *as it now stands*, or on a judgment that district inequalities functionally defeat the ends of the federal plan—it is relevant to trace down to now the process of Congressional apportionment among the States, under the constitutional scheme. If we do this, we find that the federal scheme not only was in the be-

ginning but has always been and is today one which tolerates considerable variation in constituency population per Representative, without, so far as appellant is aware, any feeling that its root-principle is being violated.

As an example, using the 1970 Census, Oklahoma (with six Congressmen) has an "ideal" Congressional district of 426,542, while Connecticut (also with six Congressmen) has an "ideal" district of 505,370—a difference of some 79,000 *per district*, or more than 16% variation up and down from the average "ideal district" of the two States taken together, which happens to be close to the overall national "ideal district" of 465,352. Much wider divergences appear: Idaho (two Congressmen) has an "ideal" district of 356,504; Maine (also with two Congressmen) has an "ideal" district of 496,832. (All data on Congressional Districts, here and hereinafter, are from the pamphlet series, Bureau of the Census, CONGRESSIONAL DISTRICT DATA, DISTRICTS OF THE 93d CONGRESS (separate pamphlets for the separate States).)

Is it the case that anyone would say that Connecticut's Congressmen are not elected ". . . by the People . . ." (Art. I, § 2, a phrase heavily stressed in *Wesberry*) as much as Oklahoma's are elected "by the People"?

Appellant here reproduces a calculated tabulation of the range of variation, amongst the States, from the national "ideal district" (202,428,262 ÷ 435 = 465,352) according to the 1970 Census:

State	Number of Districts	"Ideal" District	Deviation from National "Ideal" District	Percentage Variation
1. Alaska	1	302,173	163,179	35.07
2. Wyoming	1	332,416	132,936	28.57

3. South Dakota	2	333,129	−132,223	28.4
4. Montana	2	347,205	−118,147	25.3
5. Idaho	2	356,504	−108,848	23.3
6. New Hampshire	2	368,841	− 96,511	20.7
7. Hawaii	2	384,957	− 80,395	17.2
8. Oklahoma	6	426,542	− 38,810	8.3
9. South Carolina	6	431,753	− 33,599	7.2
10. West Virginia	4	436,059	− 29,293	6.2
11. Colorado	5	440,852	− 24,500	5.2
12. Arizona	4	443,121	− 22,231	4.7
13. Mississippi	5	443,382	− 21,970	4.7
14. Vermont	1	444,732	− 20,620	4.4
15. Kansas	5	449,814	− 15,538	3.3
16. Florida	15	452,630	− 12,722	2.7
17. Louisiana	8	455,398	− 9,954	2.1
18. Georgia	10	458,958	− 6,394	1.3
19. Kentucky	7	459,902	− 5,450	1.1
20. North Carolina	11	462,005	− 3,347	0.7
21. Illinois	24	463,082	− 2,270	0.4
22. Ohio	23	463,131	− 2,221	0.4
23. California	43	464,026	− 1,326	0.2
24. Virginia	10	464,849	− 503	0.1
25. New York	39	466,429	1,077	.2
26. Texas	24	466,530	1,178	.2
27. Michigan	19	467,110	1,758	.3
28. Missouri	10	467,740	2,388	.5
29. Iowa	6	470,840	5,488	1.1
30. Pennsylvania	25	471,756	6,404	1.3
31. Indiana	11	472,152	6,800	1.4
32. Massachusetts	12	474,098	8,746	1.8
33. Rhode Island	2	474,862	9,510	2.0
34. Minnesota	8	475,634	10,282	2.2
35. New Jersey	15	477,878	12,526	2.6
36. Arkansas	4	480,824	15,472	3.3
37. Washington	7	487,024	21,672	4.6
38. Nevada	1	488,738	23,386	5.0
39. Maryland	8	490,300	24,948	5.3
40. Tennessee	8	490,521	25,169	5.4
41. Wisconsin	9	490,881	25,529	5.4
42. Alabama	7	492,024	26,672	5.7
43. Nebraska	3	494,597	29,245	6.2

Maine	2	496,832	31,480	6.76
Connecticut	6	505,370	40,018	8.60
New Mexico	2	508,000	42,648	9.16
Oregon	4	522,846	57,494	12.35
Utah	2	529,637	64,285	13.81
Delaware	1	548,104	82,752	17.78
North Dakota	1	617,761	152,409	32.75

These variations are enormous, but, as among the States, calculation shows that the average deviation is 7.79%, while the median deviation is 4.75%. This means that the "dilution" complained of in the present case (with a maximum deviation of 2.43%) is far less than the "dilution" as to either the average or the median State, measured against the national "ideal". Of course it is *possible* for intra-state districts to be made more nearly equal than these figures suggest; the question is not what is possible, but what is required by rationally derived law. If the requirement, as *Wesberry* v. *Sanders* very plainly shows, is derived from the nature of the federal scheme, and from what that scheme envisages as satisfying the phrase, "chosen . . . by the People," has there not occurred some departure from either logic or common sense, when a requirement of very strict intra-state equality is deduced from the intendment of a scheme which was never meant to bring about any more than approximate equality among the States, and which today, without complaint or apology or feel of wrong, produces only approximate equality among the States?

Since Wesberry rests in part on the highly reasonable proposition that election "by the People", Article I, § 2, entails at least some approach to equalizing district populations, light may be thrown on our question by a glance at concept and practice in other democratic nations. Britain set up a 25% leeway by statute, but found this not enough; Dixon, DEMOCRATIC REPRE-

SENTATION 91-94 (1968). (It is surely worth remark that this Court, in *Wesberry*, refers with apparent approval to the work of the British Boundary Commission *operating under these standards*, 376 U.S. at 15 n. 36.) Australia allows 20% leeway. Mayer (ed.) AUSTRALIAN POLITICS, A READER 147-148 (2d ed. 1967); Rawson, AUSTRALIA VOTES 60 (1961). West Germany (as to the district-based parts of its legislative representation) allows 33 1/3% by law, but tries to cut this to 25% or even 20%. Dixon, *op. cit. supra.*, 95. Appellant has found no foreign country among all those commonly classified as "democratic" wherein anything like close arithmetical equality of districts is enforced by constitution, by statute, by judicial rule, or by custom. In those countries having proportional representation, the system itself of course automatically produces an approximation to equality, rather than exact equality, for it can never be guaranteed that party-vote totals will neatly fall into numbers standing in such proportion to one another as to make possible an exactly proportioned division of the disposable seats.

Does it make sense to say that the British House of Commons is not elected "by the People"? When the Texas Legislature is summarily faulted for setting up a districting plan ten times as close to equality as the most that the Mother of Parliaments ever required of herself, and closer than is required in any foreign democratic country—and that not on any specific textual ground found in our Constitution, but solely on the ground of incompatibility with the democratic assumptions enshrined in the phrase "chosen . . . by the People"—do we not need to stop and ask who it is that is out of step?

(It is not responsive to say that factors exist in

other countries justifying variance—such as the British preference for "community" representation, see Dixon, *op. cit. supra*, 93-94; the *Kirkpatrick* rule ordains that no such factors shall have effect in the United States, whether they exist or not. As will be shown *infra*, II, B, the small population variations in this plan result from a preference for county integrity. That preference is just as real as the British preference for community representation, though the population variance concerned is many times less than those allowed in Britain.)

Neither from the federal plan, nor from any discernible and authoritative intentions surrounding its inception, nor from any other source, is it possible to deduce a requirement of strict arithmetical equality between districts in the same state. That requirement, then, has no warrantable place in the substantive law of Congressional districting, as declared and supported by *Wesberry* v. *Sanders*.

2.

The nature of the data on which the exact arithmetical standard can operate is such as to make that standard instrumental to no stateable end. Constitutional law does not command purposeless actions.

The plaintiff-appellees' Amended Complaint, in its Paragraph F(7), contains the following allegation: "That the vote of a voter in the Thirteenth (13th) District *is worth less than 96%* of the vote of a voter in the Twenty-second (22nd) District;" [Emphasis supplied].

It is submitted that not one reputable political scientist or philosopher, not one sagacious practicer of politics, could be found, who would regard that

sentence as conveying any truth about political power or influence in the real world. The sentence reads, with deference, like a rather successful attempt at satire. Yet it is upon the serious meaningfulness of such sentences that the whole doctrine of exact arithmetical equality has to rest; if such sentences are not meaningful, then the imposition upon State legislatures of a rule of exact arithmetical equality in Congressional district populations is an insistence upon something that bears no relation to the value sought to be protected, or to any value. It will be the contention here that such sentences are not meaningful, and that good law does not command an idle thing.

(a) *The figures upon which the exact arithmetical equality requirement can operate are so uncertainly related to equality in number of voters at the time of their voting as to make that requirement itself a mere futility.*

The appellant's submission here is that, between the 1970 census population in any District, and even the arithmetical "worth" of a vote in that District in any year in the decennium 1972-1982, there is no such correlation as to make exact equality in the former anything like a reliable indicator of equality in the latter. If this is right, then the plaintiff who alleges and proves a small district population inequality has failed to allege and prove facts which reliably ground *any* inference of dilution of the power of his vote. It is not that a shown violation is *de minimis*; it is that no violation is shown.

The rest of this subpoint rests on the proposition that, just as it has been said that the remedy for the ills of democracy is more democracy, so the remedy for the excesses of arithmetic is more arithmetic.

(i) Logically first, though of less importance than certain other factors shortly to be examined, is the fact that the census count itself is not wholly reliable. The best evidence seems to support the conclusion that this unreliability is greatest with respect to the enumeration of minority groups, which tend to be under-enumerated. (It is, indeed, this differential character which makes under-enumeration important here; if undercount were uniform, it could not affect proportions.)

"Never in American history, from colonial days to the present, has there been an accurate enumeration of the Negro people." Alterman, COUNTING PEOPLE 262 (1969). These words, fully backed up by the chapter in which they occur, were published just before the 1970 census. The same work tells us:

> "The most thorough analysis of the census of 1960 was made by the Bureau of the Census itself. The two men most directly responsible for it were Drs. Jacob S. Siegel and Melvin Zelnick, the latter now a professor at Johns Hopkins University. Their analysis showed that blacks had been underenumerated by 10.5 percent. Among Negro men aged 15 to 44 years, about every fifth one may have been omitted from the census." *Ib.*, 280

See also the concurring opinion of Mr. Justice Fortas in *Kirkpatrick* v. *Preisler*, 394, U.S. 526, 536, 539, n. 3 (1969).

The Census Bureau planned a great effort for 1970, to overcome this problem. But the chief of the Bureau's Population Division said, "no one can say whether any or all of these efforts will *reduce* the undercount of Negroes. I, myself, doubt they will." Alterman, *op. cit. supra*, 283. [Emphasis supplied.]

It is to be noted, in this utterance, that the best hoped for was a reduction in black undercount, not its

elimination, and that reduction starts at 10.5% (see the last paragraph but one, *supra*).

To the best of appellant's knowledge, no scientific evaluation of the 1970 Census, with respect to black or other minority undercount, has yet been completed. But it would be bold to presume, in the face of the above utterances, that the problem has been solved. If it has been reduced by half—an immense achievement—there is still an enormous undercount of blacks.

This bears on Texas, though Texas is only an example. About 12.5% of Texans counted in the 1970 Census were blacks. These citizens are very far from evenly distributed throughout the State; about 192,000 were counted in the 18th District (inner city Houston) as now constituted, and less than 3,000 in the 15th, with something like an even spread between these extremes. Bureau of the Census, CONGRESSIONAL DISTRICT DATA, DISTRICTS OF THE 93d CONGRESS, TEXAS, 8-10 (1972). Quite clearly, if there is an undercount in this group, it will have a highly differential impact through the State.

There exists, as one would expect, professional opinion that undercounting occurs among Mexican-Americans as well as among Blacks. See Pritzker and Rothwell, *Procedural Difficulties in Taking Past Censuses in Predominantly Negro, Puerto Rican and Mexican Areas*, in SOCIAL STATISTICS AND THE CITY (Heer, ed., 1968) at pp. 55, 71, 77, *et passim.*

Texas has a great many Mexican-Americans; the 1970 Census shows well over two million, or more than 18% of the population. This group also is distributed very unevenly throughout the State. These numbers have to be estimated by Spanish surnames, since the over-all census count reports them as "white." On this

surname basis, the range in Texas is from more than 88% (Planning Region 19) to less than 1% (Planning Region 5); Office of the Governor, Office of Information Services, SUMMARY, SELECTED DEMOGRAPHIC CHARACTERISTICS FROM CENSUS DATA — FOURTH COUNT (1972). Any undercounting as to these people would, to an unknown degree, vitiate equality of census count.

(ii) Census inaccuracy and undercount, though doubtless existing, are probably small compared to the next demographic fact to be mentioned: *There is a very considerable sectional variation in percentage of persons eighteen years old and over, and hence of persons potentially eligible to vote.* The defense of the rule of tight arithmetical equality in district *populations*, defended chiefly or entirely as a rule equalizing voting power, (*cf. Wesberry* v. *Sanders, supra, passim*, and see *Kirkpatrick* v. *Preisler, supra*, 394 U.S. at 527-8) has to meet this plain fact head on.

The percentages of age-eligible voters, as amongst Texas Congressional Districts, computed on figures in the CONGRESSIONAL DISTRICT DATA pamphlet cited above, are as follows:

1st	68%	13th	67%
2nd	66%	14th	61%
3rd	64%	15th	58%
4th	66%	16th	60%
5th	66%	17th	69%
6th	66%	18th	66%
7th	64%	19th	62%
8th	60%	20th	63%
9th	64%	21st	65%
10th	68%	22nd	61%
11th	69%	23rd	60%
12th	64%	24th	65%

The range is from 58% to 69%, a range nearer

thrice than twice as great as the maximum up-and-down variation complained of in this case.

Of course this phenomenon is not peculiar to Texas; it is not even at its most striking in Texas; its wide prevalence ought strongly to influence this Court's fashioning of a national rule for permissible district variation. A few scattered illustrations may be given:

> The 1st Alabama has 62% persons 18 and over; the 6th Alabama has 66%.
>
> The 1st Arkansas has 63%; the 3d Arkansas 69%.
>
> The 7th Illinois has 59%; the 9th Illinois has 78%. (This example may be singled out for amplification. These districts are two contiguous parts of the City of Chicago. As between themselves, they are apportioned to a very nice degree of equality; the 7th has 464,283, and the 9th has 463,991—a difference of 292 people! Yet the 7th has 275,147 people of an age eligible to vote, while the 9th has 364,054 people of an age eligible to vote!)
>
> The 1st Indiana has 62%; the 7th Indiana 69%.
>
> The 5th Massachusetts has 63%; the 8th Massachusetts 76%.

It is to be observed that these percentage differences are widened if translated into percentages of age-eligible voters—the relevant quantity if "dilution of the vote" is the thing to be avoided. The Alabama illustration (with one of the narrowest gaps among the examples given) exhibits a 4% variation if the reference is to total population, but something like an 8% difference if the average of age-eligibles is used as the reference. In the Illinois illustration, the difference in number of voting-age people is a difference

of some 28% of the average number of voting-age people in the two districts.

The following table gives the complete picture as to all multi-district States, on the percentage variation of age-eligibles as among the districts (all figures being calculated on the applicable counts in the Bureau of the Census. CONGRESSIONAL DISTRICT DATA, 93d CONGRESS, for the respective States):

State	Number of Districts	Minimum % 18 and over	Maximum% 18 and over	Percentage Range
Alabama	7	62	66	4
Arizona	4	62	66	4
Arkansas	4	63	69	6
California	43	58	81	23
Colorado	5	62	70	8
Connecticut	6	64	68	4
Florida	15	63	77	14
Georgia	10	62	68	6
Hawaii	2	60	69	9
Idaho	2	62	65	3
Illinois	24	58	78	20
Indiana	11	62	69	7
Iowa	6	63	67	4
Kansas	5	65	69	4
Kentucky	7	62	68	6
Louisiana	8	58	65	7
Maine	2	64	66	2
Maryland	8	63	69	6
Massachusetts	12	63	76	13
Michigan	19	59	68	9
Minnesota	8	61	72	11
Mississippi	5	61	63	2
Missouri	10	63	70	7
Montana	2	63	64	1
Nebraska	3	63	68	5
New Hampshire	2	65	66	1
New Jersey	15	63	72	9
New Mexico	2	59	61	2
New York	39	57	86	29
North Carolina	11	63	68	5

Ohio	23	61	68	7
Oklahoma	6	66	69	3
Oregon	4	65	68	3
Pennsylvania	25	62	73	11
Rhode Island	2	68	69	1
South Carolina	6	59	66	7
South Dakota	2	62	65	3
Tennessee	8	64	68	4
Texas	24	58	69	11
Utah	2	59	60	1
Virginia	10	62	68	6
Washington	7	64	71	7
West Virginia	4	65	68	3
Wisconsin	9	61	68	7

It is to be observed that only 12 of the 44 multi-district States show inter-district variation, in this one respect, significantly less than the approximately 4% up-and-down population variance in the present case. On the other hand, 26 states have 5% or more variation in numbers of age-eligibles. There are eleven States with age-eligible variations, among districts, more than twice as great as the total up-and-down variation in our S.B. 1!

In the light of these figures, which seem to establish both an expectable and a permanent demographic truth about the United States (and probably about any large country), the question of the enforcement of near-exact arithmetical equality in Congressional Districts has to take on a new dimension. These figures, it is submitted, in themselves absolutely explode the idea that there is any reliable connection between exact equality in district populations and exact equality in numbers of persons eligible to vote. The enforced equalization of districts down to the last decimal cannot, *as a matter of stubborn fact*, be carried out in the name of protection of the equalization of voting power.

(The only possible way to evade the clear impact of these figures is to abandon entirely the bedrock assumption of the apportionment cases—the assumption that dilution of the *vote* is the thing protected against —and to contend that not only voters but also all inhabitants are "represented" by the Congressman. In some sense, this is unquestionably true. But if its truth is to support a requirement of exact equality in populations, without regard to variations in numbers of persons age-eligible to vote, that must be because it is judged, against all seeming, that the "representative" relation to the voter, and the "representative" relation to the non-voter, two entirely different relations, are *exactly* the same in value, a sameness expressible by exact arithmetical equalization, one to one. Actually, they are not even commensurable quantities, but are generically different.

The opinion in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), is, moreover, simply saturated with the assumption that *voting* equality is the value sought. See, for only an example, the first two paragraphs in Part II, dealing with ". . . the merits," 376 U.S. 7-8. It is as "qualified voters" and as qualified voters alone, that plaintiffs in this case have sued; it is only as qualified voters that they have alleged or proven anything which could so much as arguably give them standing to sue. A shift from the vote-dilution rationale to any other rationale would not be a minor alteration but a diastrophic change, a repudiation of the whole theory of the apportionment cases from *Baker* v. *Carr* forward.)

(iii) A further and most telling point is that district populations grow at different rates, only in part predictable, and sometimes quite surprising. If what one really is interested in is equalization *either* of voting population *or* of total population, this means that

equalization on the basis of census day (*e.g.*, April 1, 1970) only very roughly correlates with the power of the vote through the ensuing decennium, when people are actually voting. This effect is materially accentuated by the fact that the first Congress that can possibly be apportioned on the new census figures assembles in the *third* January after the April 1 census day, which means that between one quarter and three-tenths of the census decade is already gone before the figures have effect on the roll-call in the House—or, to look at the matter from aonther side, that the old figures must rule apportionment until 12 years and nine months after they are collected. The *second* Congress of President Nixon's Administration was still based, and had to be based, on statistics collected when Mr. Nixon was Vice-President under President Eisenhower.

It will be well to take a single concrete example of this, and then to give enough shorter examples to show the national prevalency of the phenomenon.

The area contained in the present 10th Texas, with 465,493 people, showed a growth rate of 24.5% in the decennium 1960-1970. The 9th Texas, with 467,483, showed a rate of 11.5% in the same period. If these growth rates have continued, then in the over 2½ years between census day 1970 and the *first* of five elections to be held under the new apportionment, the district populations were already over 13,000 people, or some 2.6% apart. Sometime well before the next election (but nine years and four elections before a new census takes effect) if the 1960-1970 growth rates continue, these two districts (so trivially variant in the 1970 figures) *will be further apart than any two districts in S.B. 1*, the legislative plan here being defended—and there will still be four more elections to

go, and more than nine years, before a Congress can be assembled (in January 1983) reflecting the "new" 1980 census figures—themselves by that time close on to three years old! Not even one election can be held under any given census, before that census is 2½ years out of date—with all that implies in the presence of those widely variant growth patterns that have always characterized and will certainly continue to characterize the different sections of any fairly large state.

These two districts have been selected not because the difference in their growth-rates is extreme—indeed, it is quite moderate compared with others encountered in Texas and elsewhere—but because another point can be made from them.

Most of the population of the 10th Texas is in the Austin Standard Metropolitan Statistical Area; most of the population of the 9th District is in the Beaumont-Port Arthur SMSA. Each of these SMSA's contains about 300,000 people.

Undoubtedly, a principal factor in the 1960-1970 growth-rate differential between these districts was the differential in growth rates between these SMSA's; the Austin rate was 39.3%, (TEXAS ALMANAC, 1972-1973, 150) while the Beaumont rate was 3.3%. (Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, 1971, 19.)

This differential is brought forward as an instance of the *unpredictability* of growth rates. For in 1950-1960 the Beaumont rate was 29.9%, while the Austin rate was 31.8%. (Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, 1961, 14-15.) In 1960, quite obviously, no demographer could have foreseen the dramatic shift that later occurred. Trade patterns, world-wide fluctuations in the oil industry,

growth in state-governmental activity—these or similar things, only cloudily if at all foreseeable in 1960, must have produced this result. But suppose that in 1960 there had been a demographer clairvoyant enough to predict this change. Is it conceivable that a legislature would believe him? Should a court order a legislature to believe him? Is it politically possible that the residents of Beaumont would have accepted as fair a drastic scaling down of representation, on the basis of a prediction that their growth-rate would in the next decade be one-eighth or thereabout of the rate in the just-passed decade?

As has just been said, this case is not extreme. The extreme range, in Texas, is a 101.1% growth rate for the 7th Congressional District, and a —7.8% growth rate for the 13th, in 1960-1970. Crude mental arithmetic easily suffices to show that, if these rates have continued, the 7th, having gained over 25% in the two and a half years since the census is already heavily "overpopulated" and "underrepresented," though "underpopulated" by 1.03% in S.B. 1., as of the 1970 census. It is an even more startling dramatization of the present point that (if 1960-1970 growth patterns have continued, both state-wide and in the 13th) the 13th Texas, the most *overpopulated* and numerically most "deviant" district in S.B. 1, is *right now*, even as we reason of these matters, some 18,000 people *underpopulated*, as against the *present* statewide "ideal!" There is something wrong, somewhere, with the invalidating of S.B. 1 in the name of either population equality or voting equality, in the light of these facts.

Of course, as the Beaumont example shows, there is no warrant that the growth patterns of 1960-1970 have continued, or will continue. If we had such certitude, then the exact equalization of populations, from

election to election, would theoretically be possible, though maddeningly cumbersome, maximally disruptive, and probably unconstitutional (since analogy with the federal plan, based as it is on the decennial census, would wholly break down). The lesson of these figures is rather that largely differing rates of growth are inevitable, but that they are not predictable in detail or sometimes even in gross.

The impossibility of accurate forecast of population changes, especially on the sub-national level, seems to be accepted by all authorities.

> "With the great fluidity of population movement within the United States and Canada, an understanding of the economic, social, and political forces motivating these movements is particularly important in making postcensal projections for geographic areas and communities. These forces may be subject to wider fluctuation in the small locality dependent upon a few specialized industries than in the heavily populated area with a stabilized and diversified economy. Accordingly, it might be expected that the problem of population projection would be less difficult in the latter situation. *However, no satisfactory technique for making subnational population projections has been developed thus far,* although a great number of methods have been used."—Spiegelman, INTRODUCTION TO DEMOGRAPHY 415 (1968). [Emphasis supplied.]

There is, so far as appellant's researches have reached, no professional disagreement as to the unreliability of post-censal projections, or as to the "much greater average error" in "projections for states, provinces, localities, etc.," as opposed to nations. Bureau of the Census, THE MATERIALS AND METHODS OF DEMOGRAPHY 806 (1971). In one extensive study of attempted forecasts, the average 5-year error was 6%,

but the extremes for the same period were 25% too low to 30% too high. Siegel, *Some Aspects of the Methodology of Population Forecasts for Geographic Subdivisions of Countries*, United Nations, *World Population Conference*, 1954 (Rome), Vol. III, at p. 122 (1955).

The enforcement of very nice equalization, on the basis of figures which will always be obsolete, to an unpredictable degree, by one-quarter of the relevant decade, on the day of the first election under the new plan, cannot realistically be mandated in the name either of population or of voting equality. If not, then in the name of what?

It seems almost otiose to add that large sectional differentials in population growth are not to be found only in Texas; they exist in virtually every State. In Missouri, for example, there are ten districts, very nicely equalized on 1970 census count, with variation up and down of considerably less than 1%, which seems to be the working definition of "zero" in some lower courts. Specifically, the 1st and the 2d Districts are unequal by a derisory 752 souls. But the growth rate of the 2d was 32.5% in the decennium 1960-1970, and that of the 1st was —13.1%. If these growth rates have continued, then simple arithmetic shows that those two districts, at the time of the 1972 election, the very first election possible under the new Census, will have differed by some 50,000 people. The 9th Missouri and the 10th Missouri were 27% apart in growth rate in 1960-1970; if this has maintained itself for 2½ years, then they are now, even as we admire the nice equalizing work of the Missouri District court, well over 30,000 people apart, much more than the two most widely separated Districts under Texas' S.B.1. Even in Montana, with its two almost exactly equal

districts as of April 1, 1970, there will be a 5.5% variation by 1975, and some 13% variation by the time (December, 1982) when the last Congress chosen under this plan is dissolved, if past growth patterns hold. (All data herein are from the state-by-state pamphlets of the Bureau of the Census, entitled CONGRESSIONAL DISTRICT DATA, DISTRICTS OF THE 93d CONGRESS.)

(iv) Another set of factors, having random but sometimes significant impact, is found in the presence within any district, but in numbers that vary from district to district, of persons who, though of voting age, are are not eligible to vote, or are eligible to vote only in some other district whereto their permanent residency is assigned by law.

Aliens may be of high importance in some districts, if one is aiming at equalization to a fine approximation. Texas, for example, had about a quarter of a million resident aliens in 1970; some 200,000 of these were Mexican (TEXAS ALMANAC 1972-1973, 146). These Mexican aliens thus constitute about 1.8% of the State's total population. If they were evenly distributed they would make no difference in apportionment. On the absolutely certain assumption that their distribution pattern follows that of Mexican-Americans (see *supra*, p. 28), they are by no means evenly distributed, but are very heavily concentrated in the El Paso area, the Rio Grande Valley, and roughly northward to San Antonio. This pattern could change, of course, but there is no reason to think that the distribution of these people is or in any foreseeable future will be anywhere near even statewide. The proportion of persons eligible to vote is therefore made significantly non-uniform, as among districts, by this factor alone. (It must be recalled that the distribution of

persons of Spanish surname shows a regional difference of something like 100 to 1, see *supra*, p. 29.)

Texas is filled with military installations. Military personnel actually resident in the State may of course vote in Texas, *Carrington* v. *Rash*, 380 U.S. 89 (1965), but not all need be resident, and many will not be. (This fact has been recognized explicitly here: "While many servicemen in Texas were not bona fide residents, and therefore properly ineligible to vote, many servicemen clearly were bona fide residents." *Dunn* v. *Blumstein* 405 U.S. 331, (1972).) These military activities are of entirely unpredictable magnitude, over any decennium; they are in fact guarded by counter-intelligence against predictability. Of course the installations are not equally distributed throughout the State. What is therefore sure is that they will generate considerable distortion of population-to-voter ratio throughout the state, and that this factor will vary unforeseeably through time.

Texas has a number of institutions of higher learning. Some of the students may and will vote at their permanent homes, others at the college city; there is no guarantee whatever that they will choose among these alternatives in the same proportions year after year. Again there is considerable possibility of distortion of the ratio of qualified voters to population, within any district.

Texas here stands only as an example. Obviously, most if not all States exhibit patterns of variance of this kind.

(v) It remains to enter two caveats on the foregoing arithmetical materials (i-iv, *supra*).

The first caveat is that these figures are not intended, and will not serve, as guides for further refine-

ment of the exact-equalization process, but are rather indicative of the futility of the quest after exact equalization. Neither legislatures nor courts could be expected to handle the superimposition of all the Ptolemaic epicycles which would have to be geared into census population in order to bring about anything near true voting-population equality on each election day. The above figures only begin to suggest the complexity; a complete model would have to allow for growth and decline not only of gross population but of alien, military, prisoner and student population, for change of preference among students as to voting place, for the coming of age of persons as young as eight on census day, as played off against the likelihood of their moving, for the percentage of age-eligibles in populations probably undercounted, as opposed to their proportions in more correctly counted populations, and so on, *ad infinitum* or nearly. One would even have to consider the exceedingly difficult question whether the *uncast* vote is entitled to just exactly the same protection, down to the second decimal place, as the *cast* vote, or whether, on the other hand, the cast vote may be "diluted" or "debased" in some other sense and in some other degree than can the uncast vote; there is surely some paradox in the concept of the "dilution of the vote" of a person who dilutes his own vote 100% by not voting. Beyond doubt, such an exercise would begin to caricature itself before it was completed. It would have to be done over with a complete new census before every election, and even then would not be accurate by the time election day came.

The figures just rehearsed rather show that exact equality is a mirage, either wholly unattainable or attainable only at a cost in contrivance which no political society will pay.

The second caveat is that no cure is to be found in the courts' merely giving legislatures the option either to take such factors as age or population growth fragmentarily into account, or to enact plans based solely on census figures. See *Burns* v. *Richardson*, 384 U.S. 73 (1966). There can be no principled or logical derivation of a rule which would allow either a blind lunge toward voter equality, such as census-count equality has here been shown to be, or some more (though still most imperfectly) refined attempt at true voter equality. What these numbers actually establish is that the phenomena upon which exact equality is sought to be imposed vary too much and too unpredictably, in a number of relevant synchronic and diachronic ways, for the predication of arithmetically exact equality to be meaningful at all. These figures ineluctably pose the question whether it can be a characteristic of good law to command the performance of a futility.

> *(b) It is the consensus among virtually all serious thinkers on the subject that "fair and effective representation" is related only loosely, indirectly, and in ways not expressible by numbers, to exact population equality among constituencies. This makes insistence upon exact arithmetical equality, at the least, futile and, at the most, counterproductive, if the goal is "fair and effective representation".*

The elementary demographic materials just presented are abundantly sufficient in themselves to establish the entire lack of reliable connection between voting power, however conceived, and exact population equality as of some long-past census day. It might be less confusing simply to omit reference to vaguer and more philosophic notions. Nevertheless, the present

main point cannot be dealt with in the round without some mention of the fact that even perfect voting-population equality on election day (something which must be dealt with in counterfactual conditional form, since it cannot be attained unless by rare chance) would not bring about equality in "fair and effective representation", the only goal ultimately worth seeking (*Reynolds* v. *Sims*, 377 U.S. 533, 565-6 (1964)); indeed, "equality", a literal arithmetical term when applied to populations, is a metaphorical term, inviting judgment rather than counting or measurement, when applied to "fair and effective representation".

It is in no way in appellant's interest in this case to persuade this Court of the correctness of any theory of "representation", among the many, complete or partial, fully-baked or otherwise, that have been brought forward both before and since *Baker* v. *Carr*. (For a sampling of this enormous literature, and leads into the rest of it, see Dixon, DEMOCRATIC REPRESENTATION 3-57 (1968); Pennock and Chapman (eds.) REPRESENTATION (1968).) Nor would the appellant presume to forecast how far the Court may ultimately wish to go in choosing among these, and in implementing its choice, though it is very hard to see how such choice could be made according to law. All that need now be said is that, as far as appellant is aware, no partial or complete theory of fair and effective representation maintains or implies that there is a straight-line relation between exactness of population or voter equality and nearness to the goal of fair representation, though few if any such theories do not see *approximate* equality as a *sine qua non* of representative fairness. If correct, this would mean that the insistence on exact arithmetical equality is not an insistence on fair representation as such.

At the worst, insistence on exact arithmetical equality may be counterproductive with reference to the goal of fair and effective representation, for it bounds all experiments in constituency formation with a stringency of numerical requirement that is not related to the fair-representation goal.

Appellant repeats, however that the arithmetical data, developed in point A(2)(a) *supra*, conclusively show the lack of any reliable connection between voting power and exact census-count equality; the more philosophical material herein referred to simply places this demonstration in a field of reference that makes the point visible from another side, though no more certain.

3.

Subpoints 1 and 2 are interconnected. The nature of the Wesberry *rationale (Subpoint 1) is such that it could never lead to the performance of a futile act, as Subpoint 2 shows insistence on exact arithmetical equality to be.*

The sentence in the plaintiff-appellees' complaint, with which subpoint A, 2 began (*supra* p. 25) is without referent in the real world; it is true only by postulational fiat, by imagination of a state of things which in part never was and in part had ceased to be before the complaint was drawn and filed. Federal constitutional law should not and, properly interpreted, does not, reach deep into State structure for no other goal than that of protecting a fictitious equality, an equality corresponding to no discernible phenomenon in the world of real voters and voting, or in the wider world of political power and influence of which voting is a part.

It is the submission here that the two subpoints above, I, A, 1 and 2, are not independent, but profoundly related.

First, as brought out in A, 1, *supra*, *Wesberry* v. *Sanders* rests in part on *implication* from the federal scheme. In A, 1, it was shown that nothing in the history or nature of the federal representational scheme could serve to make that scheme the first term in an analogy which would lead to a requirement of strict district equality. The contention in A, 2, has been that the nature of the data on which such a requirement must operate, and of the wider frame of politics within which it operates, makes it impossible for the requirement to serve any practical function, or to advance any value.

The connection between these points is found in the fact that the first of them exhibits that *Wesberry* v. *Sanders* rests on an analogic or structural argument, an argument from the nature and intendment of the federal plan, rather than from anything said with unavoidable clarity, or indeed with any clarity at all, in the Constitutional text. If a given norm is stated with literal clarity in the Constitution, then it must be obeyed; it does not make any difference whether it is sensible or practical to allow the President only ten days, Sundays excepted, to return a bill (Article I, § 7). But the constitutional norms regarding congressional districts are not like that. The rationale of *Wesberry* v. *Sanders* is, fundamentally, that the nature of the federal plan is such that gross inequality in districts is functionally inconsonant with it, and makes practical nonsense in its presence.

Appellant submits that it is the first requirement of a rationale of this implicational or analogic form that it must lead to a sensible, practical result. The argument says, in effect, that equalization of congressional districts within each State is requisite because inequality in such districts practically disserves the values

sought by the national plan. But if the insistence on very close arithmetical accuracy serves no value, no practical end—and that, as appellant has just shown in Point I, A, 2, is very clearly the case—then the argument fails, quite as much for that reason as for the reasons, developed in subpoint 1 above, that the original intent surrounding the inception of the federal plan cannot be shown to support a requirement of exact arithmetical equality, and that the nature of the federal plan makes that plan unavailable as the departure-point for an analogical argument leading to a requirement of tight district equality.

The second connection between the two points, 1 and 2, *supra*, is to be found in the fact that *Wesberry* seems to rest in part on the imputed intent of the Framers—on a judgment as to what they would have said of district inequalities. ". . . [E]qual representation for equal numbers of people . . ." is said to be ". . . the high standard of justice and *common sense* which the Founers set for us." 376 U.S. at 18 [Emphasis added].

The italicized words are crucial to the present point. If as herein shown, the exact arithmetical equality requirement serves no practical end, then few things can be plainer than that the common sense of the Founders would have led them unhesitatingly to reject it. The appeal here is not to a common sense general among mankind, but to the unique and uniquely well demonstrated political common sense of the Framers—a common sense that breathes in most of what they said and in everything they did. What would be the answer, if one could ask James Madison, "Shall we involve the federal judiciary in enforcing against the state legislatures a rule of exact arithmetical equality in district populations, a rule which can be shown to serve no practical end, since the 'equality' it commands is quite

fictitious?" To frame Madison's answer *verbatim* would be to adventure into eighteenth-century rhetoric, but who can doubt what the general bearing of the reply would have been?

To summarize at this point, the exact-equality requirement of *Kirkpatrick* is in error, (1) because neither the intent in 1787 nor the nature of the federal plan supports the requirement; (2) because the nature of the figures on which the requirement can operate, and the nature of the political universe, make the requirement a futility, a thing good law can never command; and (3) because these two points, as just shown, are connected and reinforce one another. Unless shielded by some considerations extrinsic to the merits, *Kirkpatrick* should be modified.

B. There are discernable no factors extrinsic to the merits that can protect Kirkpatrick from modification. On the contrary, great harm seems to flow from the requirement of arithmetical exactness.

If, for the foregoing reasons, *Kirkpatrick* was in substantive error, in deriving from Article 1 § 2, of the Constitution a rule of strict arithmetical equality, then, since not all erroneous precedents are suitable for overruling or substantial modification, it remains to state why *Kirkpatrick* exhibits none of the factors which can and do protect the dubious (and sometimes even the discernibly erroneous) precedent from change. These factors have recently been canvassed here, see *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970):

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of

> individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reason for rejecting any established rule must always be weighed against these factors."

"The first factor, often considered the mainstay of *stare decisis*, is singularly absent in this case." *Moragne*, *supra*, 398 U.S. at 403. These words are as applicable here as in *Moragne*. In the nature of the case, no vested interests can possibly have arisen in reliance on *Kirkpatrick;* no commitments can have been made in the expectation that the *Kirkpatrick* rule would stand unmodified. The rule of the case can operate only to invalidate and undo the work of a districting legislature, after that work is done—or to discourage a Legislature from undertaking the work at all, see *infra.*, p. 59. No meaning can be given to the concept of action in reliance on a rule having only those applications.

Secondly, *Kirkpatrick* (as to its requirement of arithmetical exactness) now stands as a solitary precedent, substantially without ancestry or progeny in this Court. A modification of the rule of the case would neither disturb a long-settled course of decision here, nor impeach the efficacy of that repeated consideration which is evidenced by such a course of decision. The cases cited in *Kirkpatrick*—*Swann* v. *Adams*, 385 U.S. 533 (1964), and *Davis* v. *Mann*, 377 U.S. 678 (1964) —concerned deviations many times greater than that shown in *Kirkpatrick*, and hence did not speak and could not have spoken to the issues of tight arithmeti-

cal equality. The same is true of *Wesberry* v. *Sanders*, *supra*. The *Kirkpatrick* rule has not been applied again in this Court; the cases wherein *Kirkpatrick* has been cited have, it seems, involved variations large enough not to raise the issue of tight arithmetical equality. See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *Ely* v. *Klahr*, 403 U.S. 108 (1971); *Connor* v. *Williams*, 92 S. Ct. 656 (1972).

The other side of this coin is that it can be no matter for wonder, in this very new field of districting and apportionment, that some truing-up may need to be made of freshly enunciated rules. Such adjustment has occurred in every field of law as it has developed; with *The Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825), *e.g.*, compare *Jackson* v. *The Steamboat Magnolia*, 20 How. (61 U.S.) 296 (1857), and the history therein recited. The difference in this field is only that the development has been compressed within a short span of time. Confidence in the judiciary, see *Moragne*, *supra*, at 405, can only be increased by a timely show of willingness to go through this necessary work of adjustment.

The third *Moragne* criterion, the interest in "fair and expeditious litigation," 398 U.S. at 404-5, necessarily suggests a weighing of "expedition" against the harms arising from the erroneous precedent. The *Kirkpatrick* rule (like the pre-*Moragne* rule) is not evidently innocuous, but is in all probability productive of great harm. Some of these untoward consequences are well illustrated in this case; others are illustrated in other recent cases in the lower courts.

The dominant one among many harms is the one that appears on the face of the matter, in every case where the *Kirkpatrick* rule is applied. If the *Kirkpat-*

rick requirement of utmost possible arithmetical equality is wrong, then its application is in all cases an unjustified trespass by the federal judicial power upon some of the most important decisions of the State Legislatures. The line overstepped, if overstepping there be, is the principal boundary-line of our federalism, now, as in the time of Herbert Wechsler's classic essay, chiefly guarded by political structure; see Wechsler, *The Political Safeguards of Federalism*, in his PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961). Of course State Legislatures are limited by the national Constitution, but it is equally true that national intervention in their work is limited by the Constitution, and by respect for the values of federalism, and that no unjustified encroachment on this work can be regarded as harmless error. If, as argued in Point A, 1, *supra*, the exact arithmetical equality rule of *Kirkpatrick* is in error, then the enforcement of that rule against the State legislatures is "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." (Mr. Justice Holmes, as quoted by Mr. Justice Brandeis in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 79 (1938).) This is really enough to establish that the rule in *Kirkpatrick* is not innocuous. But there is more.

An inevitable or nearly inevitable concomitant to this substantive intervention is what has become (appellant makes bold to say) the shockingly common redistricting of states by courts. The present case, again, illustrates this evil; as to the quantum and scope of judicial consideration brought to this matter in this case, see Point III, *infra*. Other cases from the lower courts, however, illustrate the prime thing that is wrong with this species of judicial activity, no matter

how carefully the decree may be considered—the absolutely irreduceable fact, which can be faced or ignored, but not exorcised, that every districting plan, by whomever promulgated, necessarily has deep political effects, and therefore cannot be constructed without the conscious or unconscious making of many purely political decisions.

The assertion that districting always calls for a very large number of purely political decisions is not an empty generality, but could be copiously—almost endlessly—illustrated from the record in this very case, or in any well-tried case on districting. The range may be shown by examples at widely different levels of generality.

First, as a simple example, let us consider the treatment of Hill and Ellis Counties, in S.B. 1 and in Plan C respectively. In the Texas Legislature's plan, Senate Bill One, District 6 comprises Johnson, Ellis, Hill, Navarro, Limestone, Robertson and Brazos Counties, and parts of Dallas and Tarrant Counties. These counties, other than Dallas and Tarrant, contain some 236,000 people, as of the 1970 census, and are predominantly agricultural. Thus, in the Legislature's District 6, there is something near a balance between these agricultural regions and urbanized parts of Tarrant and Dallas Counties. Under these circumstances, it may be assumed that agricultural interests will have great weight in the choice of a Congressman, with all that implies as to having his ear.

Now in Plan C, adopted by the court below, Hill and Ellis are detached from the other rural counties in this district, and are grouped (in a district numbered "24") with a large portion of Dallas County. Hill and Ellis aggregate some 67,000 people; these two pre-

dominantly agricultural counties are then entirely outnumbered, for of the nearly 400,000 people in Dallas County with whom Hill and Ellis are grouped, the great majority are in the City of Dallas or its suburbs.

Now appellant is not for one moment asserting or implying that one of these treatments of Hill and Ellis Counties is better than another. Three things are, however, confidently asserted: First, the two widely varying treatments of these two counties is significant, is not presumptively trivial, unless all issues about representation are trivial. Secondly, districting for Congress involves a great multitude of such choices, related to one another in exceedingly complex ways, so that any court that districts a state must make a very large number of choices like this one, whether consciously or unconsciously. Thirdly, this is not a good thing for courts to be doing, because there is nothing in law, nothing reachable by the methods of law, that can possibly answer such a question as whether Hill and Ellis Counties should be grouped with other agricultural counties to make up about half the population of a district, or grouped with an overwhelming urban majority, so that other agricultural counties may be put into other configurations, where *their* agricultural interests will decidedly predominate.

(It may be said parenthetically that the decision on this point is obviously far more significant to the inhabitants of Hill and Ellis counties than a small population variance from "ideal" could possibly be. It ought also to be noted that the decision not to make such choices consciously, but to refer them in some way to random chance, is itself a highly political decision.)

To take another example, this time at a very different level, a strategic level, so to speak, someone

must decide whether or not the overall plan of districting is to reflect a concern for maintenance of present constituency-incumbent relations—or, to put the matter another way, whether congressional districts are to be continued as entities from decade to decade, with necessary peripheral adjustments to effect required population equality. The reference here is to the so-called "core-concept."

The decision to follow the core-concept is a political decision. The decision not to follow it is a political decision. Whoever districts must make this decision. If a court draws district lines, then a court must make it, and it makes the political decision just as much by not following the core-concept as by following the core-concept. But there is, it is submitted, nothing in law or derivable from law that can assist a court in making this purely political choice. (For the connection of the core-concept with this case, see *infra* (p. 72.)

Thirdly, and on the most general level of all, districting by courts can be done according to law only if the law somehow receives into itself some clear, coherent and complete theory of "fair and effective representation," as this works out into constituency-building (*supra* pp. 42-44). The reception and espousal by this Court of such a theory (out of the welter of theories competing in the literature) has not taken place. Appellant ventures to suggest that it will not take place, because the selection of a complete set of canons on fair representation cannot be validated by any sanctioned or legitimate method, however latitudinarian, of constitutional exegesis. A distinction is to be taken here between a rule of *partial* coverage, sufficient to *invalidate* a plan, and a set of rules or principles sufficient in coverage to *form* a plan. For example, there must be some point (one would hope it would be

reached quite early) at which a racially discriminatory motive or impact *invalidates* a plan; see *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). But a rule against racial discrimination cannot suffice affirmatively to *form* a plan, or to ground the choice among the virtually numberless plans none of which will be racially offensive.

The consequence would seem to be that courts of law ought to seize upon every legitimate means of avoiding affirmative districting. Appellant cannot absolutely guarantee that the allowance of reasonable numerical latitude to the States' districting bodies will significantly further this disengagement. But (if it be agreed that the arithmetical-exactitude rule is without substantive warrant, see Point A above) then there can be no harm in testing out the common-sense prediction that the easing of this rule will bring it about that more legislative plans will pass muster, and that the courts will correspondingly be less involved. Professor Dixon, a leading authority on redistricting and reapportionment, has said:

> "When given clear mathematical guidelines, few legislatures have failed to accomplish reapportionment. For example, in September of 1965 after months of futile legislative effort, the California Supreme Court gave a new deadline and two main guidelines: no district could deviate by more than 15 percent from the average district; the electoral percentage in each house had to be 48 percent or higher. In a month reapportionment was accomplished, and there was no appeal." Dixon, DEMOCRATIC REPRESENTATION 18-19 (1968)

This last point should be made clear beyond possibility of misunderstanding. Appellant is not saying that the strict rule of *Kirkpatrick* should be eased because that easing will in high probability disengage the courts from much districting work. Appellant has

tried, on the contrary, to show that the *Kirkpatrick* rule is wrong as a matter of law, see Point I, A *supra*, without reference to judicial convenience or even to the propriety of judicial engagement in districting. The present line of argument goes only to the question, "Is the *Kirkpatrick* rule, though substantively wrong, so evidently harmless that adherence to the *Kirkpatrick* precedent is innocuous?" Appellant's answer to this question is in the negative; the erroneous *Kirkpatrick* rule not only interferes unwarrantably with State political structure, but also is in all probability a principal cause for the current heavy involvement of the courts in the work of districting, to which their legitimate intellectual tools are inapt and inadaptable; easing of the erroneous *Kirkpatrick* rule would in all probability not be a step without practical benefit, but on the contrary one which would relieve the courts of much of this unsustainable burden.

In other respects than their tendency to lead to judicial districting, ordinary actions at law can be seen to be exceedingly poor vehicles for dealings with political structure. Some of these reasons are illustrated by this Record, some by other cases recently handled in the lower courts.

The initiation of a districting suit is a matter of chance and of private choice. We have ten plaintiffs in this case, out of some 11 million people, and some 2 or 2½ million voters, in Texas. What would have been the situation if no one of these ten people had chosen to sue? This choice, realistically, will often be made on the basis of available resources, or of counsel who will donate their services; see the Motion to Dispense with Printing filed by appellees herein.

Massachusetts may be taken as an example of the

fortuitous impact of private decision. That State, with an "ideal" district of 474,093, has districts which vary from 469,438 to 477,054, a variation of 7,616, or about 1.6% up and down. If the *Kirkpatrick* rule means what it has been taken to mean, and is right, then so palpable a variation is vulnerable, if the Legislature might have done "better." It is unbelievable that a "better" plan could not be devised, if legislative give-and-take, and all prudential factors, are inadequate justifications for slight variances. At least, if *Kirkpatrick* is right, the question whether the Legislature could have done "better" should be settled in court. But nobody in Massachusetts has sued, and the Massachusetts plan stands.

The existence of meaningfully large variations probably insures a suit, since such variations threaten real harm to the grossly under-represented interests. When such real harm does not threaten, then legislative plans will, under *Kirkpatrick*, stand or fall according to the accidental initiative and persistence of litigants, in cases where no substantial interest of any litigant, or of any class to which he belongs, is actually at stake.

(Inevitably, these considerations lead to doubts as to "standing", see *Frothingham* v. *Mellon* 262 U.S. 447 (1923).) The insubstantiality of the injury to the plaintiffs, in a case such as the present, makes it legitimately questionable whether they are doing any more than asserting a "right" . . . to require that the government be administered according to law . . ." *Fairchild* v. *Hughes*, 258 U.S. 126, 129 (1922), cited in *Baker* v. *Carr*, 369 U.S. 186, 208 (1962). For example, the first-named plaintiff in this case, who was present at the trial, and who seems to have had a chief role in drawing the plan ultimately adopted by the court below (see Amicus Brief of Senator Lloyd M. Bentsen in

connection with the application for stay of the lower court's judgment, pp. 18-19, and appellee's Reply thereto, pp. 4-5), Dan Weiser, lives in the Sixth District under S.B.1; the "overpopulation" in that District is .30%. The fact that the inhabitants of grossly underrepresented districts have standing *(Baker* v. *Carr, supra)* does not imply that everybody has standing. But the question of "standing" is so clearly governed by the same considerations as those that bear on the questions going to substantive merits that the Court, it would seem, need not enter on the consideration of "standing" as a separate matter.)

When one passes from the institution of the suit to the matter of appeal, there is found again a fortuitous impact of choice on the part of litigants. In *Drum* v. *Scott*, 337 F. Supp. 588 (M.D. North Carolina 1972), the lower court approved a legislative Congressional districting plan which is very much like the one in this case; the up-and-down variation is 3.79%, some .3% lower than ours, but the average deviation is 1.01%, as opposed to our .745%. These two plans—the Texas and the North Carolina plans—cannot sensibly be distinguished. Yet, since no appeal was taken in *Drum* v. *Scott*, the North Carolina plan stands. *Cf. Prince* v. *Kramer* (W.D. Washington, Civil No. 9668, April 21, 1972) where a court-devised plan seems to show (on the basis of appellant's own calculations) a 4.77% up-and-down variation, but wherein it seems no appeal has been taken.

There is another and much more difficult appeal problem—that arising in the case where the legislature's plan is obviously or concededly invalid, and where the lower court has selected among proposed plans. An example is *Donnelly* v. *Meskill*, 345 F. Supp. 962 (D. Conn. 1972). Unconstitutionality of the cur-

rent plan was conceded by all; the material problem for the court was the selection or devising of a new plan. Three plans were considered:

(1) A plan submitted by a private plaintiff, cutting no town lines but seemingly somewhat lacking "compactness", a virtue quite insusceptible of exact definition; (2) A plan submitted by the Republican Chairman, cutting five towns; (3) A plan submitted by the Democratic Chairman, cutting five towns. All plans were of virtually zero deviation. Selection among these plans involves, first, the decision whether a gain in "compactness" is worth cutting five towns. Then the court must decide between the "Democratic" plan and the "Republican" plan. It is earnestly submitted that this is an altogether undesirable position for a court to find itself in, since neither of these questions has about it any flavor of law, and the second one absolutely inevitably involves the court in partisan politics.

The Connecticut District Court, as it happens, picked the Democratic plan. The Attorney General of Connecticut has not (so far as appellant can ascertain) filed an appeal. Appeal by a private party (even where technically possible) must depend on private initiative and resources. The subjection of a State's political structure to these factors, like the involvement of courts in such decisions, is a thing that ought to be avoided to the last ditch.

Two more points must be made about the process of appeal in cases such as this. First, where the lower court's selection of a plan is based on totally extra-legal, prudential factors, the framing of an appeal in terms of "error" is exceedingly difficult; where no law governs, a mistake of law is hard to pin down. Second-

ly, it is not acceptable, either as to standards of arithmetical equalization or as to the factors governing the choice of plans, that there be a total want of uniformity of judicial holding throughout the nation. Yet that is the expectable result, if this Court is not to consider every case.

Mention ought to be made here (because the evils under examination are so copiously illustrated by it) of *Skolnick* v. *State Electoral College Board of Illinois*, 336 F. Supp. 839 (N.D. Ill. 1971). The opinion in this case does not summarize easily, for it embodies a large number of choices obviously purely political. There is a withering dissent, in which the necessarily political thrust and impact of the plan the court adopts is shown. But any plan the court had adopted would have had thorough-going political effects. The opinions should be scanned by anyone who doubts that the districting process is leading the lower courts into the consideration of questions plainly not amenable to solution by the methods of law. *Cf.* also *David* v. *Cahill*, 342 F. Supp. 463 (D. N.J. 1972). Here again there was a vigorous dissent, laying absolutely bare the unavoidable political effects of the court's adopted plan.

As a final point, it is quite possible that the abdication by some legislatures of their responsibility, and their total failure to enact plans, arises from a sense of hopelessness engendered by the zero-variation standard of *Kirkpatrick*. See *Donnelly* v. *Meskill*, 345 F. Supp. 962 (D. Conn. 1972); *Prince* v. *Kramer*, (W.D. Wash. Civil No. 9668, April 21, 1972); *Skolnick* v. *State Electoral College Board of Illinois*, 336 F. Supp. 839 (N.D. Ill. 1971); *Legislature* v. *Reinecke*, 6 C. 3d 475, 101 Cal. Rptr. 552, 496 P. 2d 464 (1972); *Dunnell* v. *Austin*, 344 F. Supp. 210 (E.D. Mich. 1972). A legislature told that it may have a given leeway might aim

at a point well within that leeway, and so be reasonably sure that its work was not futile; a legislature told that no variations are permitted might naturally shrink from undertaking this hopeless task. At least, as the cited cases show, that is what some of them are doing. That condition cannot be acceptable to this Court; no one, at the time of *Baker v. Carr*, 369 U.S. 186 (1962), thought that the result of that decision would be that a very large part of the affirmative work of districting would pass into the hands of the courts. The Solicitor General of the United States, *amicus* in *Baker*, said, for example:

> "Mr. Cox: The other possible remedy in *Colegrove* v. *Green* would have been to redraw the Illinois [congressional] districts on the map. Now I don't see how a court could embark on such a task as that, that there are just too many possibilities and that is too much involved in the political process, that it is something that a court really shouldn't undertake to do."—Cortner, THE APPORTIONMENT CASES 113 (1970)

It would be possible to extend very considerably this typology of horrible examples; the lower federal and state courts are, as this Court is aware, very heavily engaged in the districting process. This engagement is undesirable, for all the reasons that have been given, and for many others. It is hard to think we have entered a world wherein its desirability is even arguable. Appellant, as has been said above, cannot predict with certainty that the allowing of reasonable leeway would decrease this engagement, but common sense would suggest the strong possibility that the allowance of such leeway would greatly decrease the number of plans with which this Court and the lower courts will have to deal.

Again, appellant does not put forward this practi-

cal gain as an affirmative reason, in itself, for modifying the *Kirkpatrick* rule. Difficulty and involvement could never be reasons, in themselves, for stepping back from the enforcement of constitutional rights. Appellant's contention in chief is that the rule of strict arithmetical equality is not warranted by substantive law. The point here is only that, far from being obviously innocuous, the rule of *Kirkpatrick* in all probability produces much harm. If (as appellant has contended) *Kirkpatrick* is substantively wrong, then it becomes material that no prudential considerations stand in the way of its modification.

(It ought to be said here, parenthetically, that, even if *Kirkpatrick* be not regarded as suitable for modification as to its general close-equality rule, the case ought still to be modified with respect to its seeming rejection of respect for county integrity as justification for very small variances, for substantially the reasons developed in Point II, B, *infra*.)

C. This Court might warrantably select a stated percentage of variation permissible without inquiry, as a plainly needful remedial device.

The present judgment must be reversed, and Senate Bill One validated, if any modification in the rule of strict arithmetical equality be mandated by law, for the deviations herein shown clearly fall well within any imaginable area of reasonable approximation. Such a holding, however, might still leave the courts below, and this Court, in a position of considerable involvement in State political processes, for judgments of sheer reasonableness must be made case-by-case, and rules would form quite slowly. Legislatures, moreover, would at this time have to proceed without knowing what was expected of them. Appellant will, therefore,

further contend that this Court may warrantably set a fixed percentage figure of permissible variation, so long as independent constitutional norms are not invokable. The choice of such a figure could not properly be called arbitrary; it is never "arbitrary" to do that which is needful. The much panegyrized remedial flexibilities of equity are not so constricted that the selection of a number, where a number is urgently required, is beyond them.

The recent case of *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 372-375 (1971) is here very closely in point. In that case, this Court faced the problem created by the fact that a penal statute, which could be valid only if it had a short limitation period, set up no limitation period at all. The Court concluded not only that it might read such a period into the statute, but also that *74 days* (60 days to begin the proceeding and 14 days to conclude it) was to be that period. Mr. Justice White's plurality opinion was joined, as to its Part I, wherein the limitation-period choice was made, by five other members of the Court. This case alone would serve to refute the idea that the selection of a definite number, for satisfying a constitutional standard, is beyond the capacity of the judiciary. See also *Dunn* v. *Blumstein*, 405 U.S. 331, 348 (1972). In the very field of apportionment, this Court has designated ten years as the period after which failure to reapportion is constitutionally suspect; *Reynolds* v. *Sims*, 377 U.S. 533, 583-4 (1964).

The judicial selection of a number, for clarity and convenience, did not first enter the world with these recent cases. In maritime law, for example, several instances occur, such as the rule of deducting one-third new for old, in insurer's payments for ship repairs. *Da Costa* v. *Newnham*, (1788) Term Reports 407

(King's Bench); 2 Chorley and Bailhache, THE LAW OF MARINE INSURANCE AND AVERAGE, 1026 (1961). In *Fenwick* v. *Robinson* 3 Car. and P. 323, 324 (King's Bench 1828), it is said forthrightly that this rule is adopted "to avoid discussion in each particular case". In *The Gratitude*, 42 F 299, 301 (S.D.N.Y. 1890) Judge Addison Brown gave these reasons for adopting and imposing the 40-day rule that has since prevailed as to lien priority in New York Harbor:

> "I think the time allowed for retaining priority in these harbor cases may be justly reduced to 40 days. That will give the short credit incident to the usual rendering of monthly bills, and 10 days more for settlement, or libeling the boat in case of nonpayment. It accords in some degree with the period of modern Atlantic voyages; it does not exceed the time ordinarily enjoyed by the ship in the ante-steam period; and it is short enough not to imperil, as a rule, the security, or the partial security, afforded to damage claims, which the maritime law designs also to protect, though subordinately to contract liens on the same voyage, according to the universal practice (except under peculiar circumstances) of at least the last 200 years. The long extension of time heretofore given has led to evils and abuses here, which observation satisfies me ought to be corrected by a nearer approach to the general maritime rule; and the time limit of 40 days, after which such liens will be held to lose their priority as regards any liens arising on a subsequent voyage, or trip, will, I think, subserve all that necessity and that encouragement of commerce for which maritime liens have been created, and for which they are preserved; and that time will not ordinarily or substantially prejudice damage liens, which are of a lower rank, beyond that inferiority which for centuries has been assigned to them as *non-beneficial liens. The time limit is, indeed, an arbitrary limit;* and so is the

season limit, or any other limit that can be adopted for harbor tugs consistently with the existence of such liens at all for any practical use. Any other rule than the voyage rule must be arbitrary, and that rule would leave no practical security whatever. [Emphasis supplied.]

For other lien period rules, similarly adopted, see 2 Benedict, ADMIRALTY 297-9 (6th ed. 1940).

Indeed, the rule against perpetuities, and the common law rules as to majority and age of consent to marry, are creations of judges, fashioned for giving a needful clarity to that which without a definite number remains needlessly and inconveniently vague.

No number can be derived mathematically or logically for the districting problem, any more than one could be so derived for the maritime lien problem. The real reason for picking any given number is that *some* definite number is needed, since benefit will in strong probability flow from its selection. Appellant ventures to point out, however, that the integer nearest equidistant from the average and median variation of the states from the national "ideal" (7.79% and 4.75% respectively) is six (the same figure, as it happens, as the 6% average 5-year error found in one study of subnational population projections, *supra* p. 37) and to suggest that a leeway of 6% up or down could never be unreasonable, or out of harmony with the federal scheme, on analogy to which the equal-district requirement is rested, see *supra*, pp. 20-23, including table on p. 21.

(Professor Dixon has made an unanswerable case for the utility and justice of some such leeway; Dixon, *The Warren Court Crusade for the Holy Grail of "One Man—One Vote,"* 1969 SUPREME COURT REVIEW 219, 234-243 (1969). But appellant contends that equity

needs neither a constitutional amendment nor a statute to do that which is clearly best.)

In any event, no variation whatever should be permitted if it effectuates violation of some wholly extrinsic norm, such as the rule against racial discrimination. The flexibility appellant advocates is based on considerations going to the substantive law of district population equality, and on those alone (see *supra* at p.); these have no application to guarantees of a quite different substantive origin.

Appellant emphasizes again that the disposition of his single case does not require choice of a number; it requires no more than the allowance of *reasonable* leeway, since the variations here must beyond doubt fall well within the "reasonable", however defined. The present subpoint is made simply as a suggestion of a manner in which the Court may modify the unwarrantedly strict *Kirkpatrick* formula without setting the question of "reasonableness" wholly at large.

II

Kirkpatrick *v.* Preisler, *sole reliance of appellees herein and of the court below, may sensibly be distinguished from the present case, and did not therefore compel the judgment appealed from.*

In its short *per curiam* opinion, the court below has treated the present case as one wholly ruled by *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), citing that case, without discussion, as single and sufficient authority for invalidation of the Texas Legislature's plan for Congressional districting. While appellant has contended (in Point I, *supra*) that the *Kirkpatrick* rule, however interpreted, goes distinctly beyond the warrantable substantive law of Congressional districting, and that the *Kirkpatrick* holding ought therefore to be modified, it is the submission here that the present case

can legitimately be distinguished from *Kirkpatrick*, even if the *Kirkpatrick* rule is generally to stand.

Kirkpatrick governs this case, without more, only if the *Kirkpatrick* rule is that any palpable inequalities in congressional districts, even (like those in the present case) substantially smaller than those in *Kirkpatrick*, generate a virtually irrebuttable presumption of bad faith in the legislative districting process, and are unjustifiable on any ground normally emerging from that process. That reading of *Kirkpatrick*, concededly one encountered in much of the commentary, takes insufficiently into account the *Kirkpatrick* opinion's careful canvass of the *specifics* of the Missouri process under judgment in that case, and fails entirely to weigh the historical and functional setting in which *Kirkpatrick* was presented to this Court, as well as certain clearly visible characteristics of *Kirkpatrick* that are found in the lower court's opinion and findings in that case.

Since the specifics of *Kirkpatrick* are clearly arrayed both in this Court's opinion and in the long and careful opinion of the District Court in that case [reported as *Preisler* v. *The Secretary of State of Missouri*, 279 F. Supp. 952 (1967)], many distinctions are apparent. Appellant will, however, select from these the two that are of dominant importance—the difference as to "good faith" (A), and the very specific difference as to "justification" (B).

A. The issue of "good faith" presents itself here in a setting altogether different from that in Kirkpatrick, since there were in that case clear and specific findings of "bad faith" in the most classic sense—intent to bring about overrepresentation of definite interests—while nothing of the sort exists here.

The first inquiry in *Kirkpatrick*, both in this Court and in the court below, was into the "good faith" of the Missouri legislature. Doubtless the most important distinction between this case and *Kirkpatrick* is that in *Kirkpatrick* there was an explicit finding, not successfully assailed, of "bad faith" in the most central and classic sense—the sense, namely, of *intentional effort* to subvert the value underlying the apportiomnent decisions. In the District Court's findings of fact in *Kirkpatrick* (of course under close scrutiny here when the case was at this Bar) the following passage occurs:

> "In Preisler II we found as a fact that 'the discrimination against the St. Louis metropolitan area, evidenced by the 1961 Act, was continued under the 1965 Act' (257 F. Supp. at 958, fn. 4). We find that the 1967 Act continues the same discrimination. We found in *Preisler II* that under both the 1961 Act and the 1965 Act 'the City of Kansas City was split between three separate Congressional districts,' and that under both acts the 'population of the City of Kansas City * * * continued to be utilized to increase the deficient population of two essentially rural districts' (257 F. Supp. at 960). We make the same finding in regard to the use of Kansas City's Platte and Clay County population in regard to District 6 created by the 1967 Act. In *Preisler II* we found that the 1961 Act and the 1965 Act 'both have *the same pattern of overvaluation and overweight of the votes in the rural geographical areas*, as contrasted with the votes in the two metropolitan areas of the State' (257 F. Supp. at 960). *We make the same findings in regard to the 1967 Act*, particularly as it applies to the St. Louis metropolitan area and the area of Kansas City north of the Missouri River." 279 F. Supp. at 975. [Emphasis supplied.]

And again:

> "The shortest answer in regard to defendants'

contention about alleged population growth in Districts 4 and 6 is that it is *ex post facto* argument designed as an attempt to justify successive Missouri Legislatures' *adamant and continued effort to malapportion in favor of rural geographical areas.* 279 F. Supp. at 983. [Emphasis supplied.]

These findings put *Kirkpatrick* in a definite historical setting, and surround all the sub-issues regarding the Missouri Legislature's "good faith" with a context of long-continued, intentional and still-continuing wrongdoing with respect to the very value sought to be preserved by the apportionment decisions. The Missouri Legislature, it was found, was trying (and long had been trying) as hard as it could to favor certain interests over others, and this in the very direction toward which malapportionment and maldistricting had overwhelmingly tended before *Baker* v. *Carr*, 369 U.S. 186 (1962), in Missouri and elsewhere. This may well have justified casting upon Missouri a heavy burden of proof with regard to all the issues, whether of "good faith" or of "justification".

This character and flavor of *Kirkpatrick* was not missed by all of the commentary. For example, a Note on the case said:

> "The Court's ruling in *Preisler* is dictated not so much from concern over mathematical variation, as it is from concern over Missouri's conspicuous bad faith in its reapportionment effort. Missouri came to the Court with inaccurate data, avoidable variances, simple solutions, and feigned justifications. Under these circumstances the Court's rejection of its districting plan was inevitable."—Note, 15 VILLANOVA L. REV. 223, 229 (1969).

Nothing of this sort has been shown or can be shown in this case. It happens, somewhat paradoxically, that the three most overpopulated (and hence, putatively

"underrepresented") Texas districts (13, 16 and 19) are in predominantly rural West Texas. But the most underpopulated (and hence "overrepresented") District (15) is in predominantly rural South Texas. The great cities, on the whole, are trivially "overrepresented", though central San Antonio (District 20), is as it happens, trivially "underrepresented". Neither on the face of the map nor anywhere else in our Record is there any evidence, or even a charge, of desire or intent to favor or disfavor any sectional or other identifiable interest, or of any patterned action tending in that direction. This Record, fairly read, affirmatively clears the Legislature of bad faith in any common sense, unless the rule clearly is to be that a legislature is presumed guilty of bad faith until the contrary is overwhelmingly shown. As the presiding judge summed the matter up at the trial below, "I agree it was probably the best you could do." (A. 322.)

It is striking that the two principal architects and managers of Senate Bill One—State Senator J. P. Word and Representative Delwyn Jones—come from Congressional districts "overpopulated" and therefore putatively "underrepresented" in that Bill. TEXAS ALMANAC 1972-3, 628-9.

It can hardly be that this entire absence of any suggestion of intent to favor or to disfavor any sort of interest can make no difference on the issue of "good faith". "Good faith" might well be found to inhere in the honestly intentioned though not totally efficient effort, eventuating in small random discrepancies (this case, at worst), while not inhering in the deliberate and persistent effort to sail as close as possible into the wind, while still perpetuating as much as possible of the old evil (the *Kirkpatrick* case; see above). Indeed, this distinction brings the usage of the term "good

faith" in apportionment decision back into line with the usage of the same term elsewhere in law. "Good faith" does not anywhere else mean total success; where there is total success "good faith" need not be inquired into.

The giving effect to this distinction—the distinction between the case, such as *Kirkpatrick*, where a definite animus in favor of one sort of section or interest is established, and a case like ours, where there is no showing of such an animus—would be profoundly historical, and sensible within the historical frame, for it would make "good faith" turn, in part at least, on the established presence or absence of a purpose to perpetuate the old historic wrong of malapportionment. It would, moreover, make it possible, in the case, like ours, where no such purpose is shown, to judge legislative efforts as they must be judged if districting is to be left with legislatures. "Good faith", in this context, must generally denote such "good faith" as can meaningfully be predicated not of a single mathematician, working with census blocks and a computer, and with nothing but numbers on his mind, but of three separate political authorities (in Texas, a House of 150 Members, a Senate of 31 Members, and the Governor) working in most intricate coaction, against time, toward compromise amongst many legitimate claims. Into such a process there will inevitably enter some inefficiency and even some weariness. To ask more good faith than that of which a Legislature is organically capable is to reject redistricting by Legislatures, except where lucky accident produces arithmetical equality. It is not credible that *Kirkpatrick*, in condemning the specific Missouri actions before it, infected as they were with proven and found *mala fides*, intended to make this choice generally and for the whole future.

Kirkpatrick need not be so read, if its generalities be taken to be controlled by the clear showing, on a record then freshly before the Court, of "bad faith" in the most classic sense.

B. The sole "justification" needed, on this Record, for these small discrepancies, is minimal respect for county integrity. Kirkpatrick, on its facts, cannot have decided that such respect can under no circumstances justify any deviation, however small, for the Kirkpatrick county-line defense was known by this Court to be sham.

When we turn to the "justification" side of the *Kirkpatrick* doctrine, two liminal difficulties appear.

First, it is not characteristic of the legislative process, here anymore than anywhere else, that it produce *official* justifications. A bill is simply passed; it need not and usually does not come accompanied by a particularized or binding statement of the reasons for its passage. Votes upon it have differing motivations; probably few voting members have the whole structure of any complicated bill in mind; this is not a matter of neglect of duty, but is inevitable in view of the pressures of time. The only pervading substantive motivation is that of the principal managers, but this does not become—even as a matter of fiction—the motivation of the legislature, unless it is publicly stated on the floor or in a generally circulated committee report, which need not be and, in State legislatures, quite often is not done, as it was not done in this case. "Justification", then, may become no more than a matter of the exercise of the ingenuity of those law officers whose duty it becomes to defend the bill.

(It is exceedingly interesting, in this connection, to note that a motion to require the Committee allocating

representatives to the States, in the Constitutional Convention, to state its reasons was lost, 10-1. I Farrand, RECORDS OF THE FEDERAL CONVENTION 565 ff., rev. ed. 1937.)

Secondly, it may sometimes be hard to distinguish between the justifiability of the motive or motives which actually produced the population discrepancies, and the propriety of some motive or motives shown barely to have existed, but not shown to have had any causal connection with the population discrepancies. A perfect example of this is to be found in the so-called "protection of incumbents" factor in this case.

Appellant earnestly submits that the term "constituency-representative relations" is the more accurate term; indeed it is very hard to see why those who are so concerned about representation should stigmatize as a mere euphemism a term which brings in both parties to the representational relationship, see Appellees' Motion to Dismiss or Affirm, at p. 9. (The assumptions seem to be that while a Congressman may like his job, no constituency can like its Congressman, or care whether he continues to represent it or not—and that no Congressman can possibly learn to know his constituency well enough to serve it better than he can serve another constituency selected for him by, it may be, a young mathematician in Dallas.) Under either name, appellant would defend this motive as entirely proper, if the burden of that defense fell upon him on the facts herein.

The case is, however, that, while there is abundant showing of an interest (though with no party or ideological bias, see A. 186-7) in maintaining presently satisfactory representative-constituency relations, and in thereby protecting the accrued seniority of incumbents,

on the part of those who managed this districting bill, there is no showing whatever of any causal relation between this interest and the population discrepancies.

The very contrary is decisively shown by Appellees' own Plan B. On oral argument below, appellees have recognized that Plan B attains the same "incumbency-protecting" result as Senate Bill One (A. 320-321); on the other hand, Plan B has entirely negligible population variations. This latter result is attained in Plan B by splitting some eighteen more counties than does Senate Bill One, while otherwise generally following the Legislature's plan. If "incumbency" could have been "protected" either with or without population variation, it makes no sense to say that the desire to protect incumbents caused the population variations. (It must be left to appellees to explain how it could lie in their mouths to assail "incumbency protection" as a legislative motive, when by their own concession their own Plan B, repeatedly put forward by them as a good solution, attains, and was known by them to attain, just about the same result, in this regard, as S.B.1).

Indeed, what has just been said makes entirely clear what it is that efficiently and proximately caused these small population variations. If the difference between S.B.1 and the virtually zero-variation Plan B is that S.B.1 respects 18 more county lines than does Plan B (though both follow much the same general plan), it is plain that the immediate cause of the population discrepancies is respect for county lines. It is, then, respect for county lines, and only that, which must be defended as a "justification" for these small variations. The appellees explicitly recognized this, in oral argument in the court below (A. 321); the deposition of one of the legislative leaders (Rep. Jones) refers to it (A. 251). It is an interesting question whether some

Texas Senators did wrong in trying to set up a congressional district for a colleague, if that is what they did, but the question does not arise in this case, unless it can be shown, as it cannot be, that the only thing complained of, and the only thing so far held to violate the Constitution in cases of the present type—population variance—was caused by this their solicitude.

Is respect for county lines, then, an admissible justification for population variances as small as those found here?

This is not an easy question for appellant, if the continued full vitality of *Kirkpatrick* be assumed, because the *Kirkpatrick* opinion seems to be rejecting this justification:

> "Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities." 394 U.S. 533-4.

But appellant submits that the issue of county lines was not presented on the *Kirkpatrick* record with that clarity which makes it suitable to regard the passage just quoted as being permanently and generally dispositive of the county-line question, because the county-line defense in *Kirkpatrick* was proven sham, a fact

which must inevitably color judgment upon it.

The *Kirkpatrick* Court twice in its short opinion refers to the fact that the single switching of whole counties at district borders could have produced a more nearly equal plan:

> "Finally, the District Court found that the simple device of switching some counties from one district to another would have produced a plan with markedly reduced variances among districts." 394 U.S. at 529.

> "Legislative proponents of the 1967 Act frankly conceded at the District Court hearing that resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality." 394 U.S. at 531-2.

A number of the easily possible and equalizing county shifts are described in the lower court's opinion in *Kirkpatrick*, 279 F. Supp. at 970 ff. One of the two judges who made up the District Court majority filed a short concurring opinion in which he said:

> "I do not condemn the 1967 Act because there were more equal plans defeated in the Legislature; nor do I condemn it because it divides St. Louis County between a number of districts. I believe the plan is unconstitutional because on its face and under the undisputed evidence it is not an attempt to divide the State of Missouri in Congressional districts that are as nearly equal in population as is practicable. *And this for the reason that it is obvious that entire counties can be moved to adjoining districts with a resulting substantial decrease in the variances of population in the present Act and because there is no evidence in this record that can be said to explain or justify why this was not done.*" 279 F. Supp. at 1004 (Em-

phasis added).

The Brief of the appellees in *Kirkpatrick*, in this Court, made this a principal point (p. 13 thereof), and offered maps showing some of the possible whole-county transfers.

The county-integrity issue in *Kirkpatrick* came to this Court, then, on a record in which just about the most conspicuous fact was that Missouri's claim of this "justification" could not be *bona fide*, since it had been shown that markedly smaller variances could have been attained by the simple device of switching counties at district borders — thus preserving county integrity quite as well as did the condemned plan. The above-quoted passage in the *Kirkpatrick* opinion was therefore uttered by a Court which must have known that, in *Kirkpatrick*, the county-line defense was a palpable sham.

Now appellant is not in a position to perform a rigorous mathematical demonstration that no possible shifts of whole counties at District boundaries would "better" the plan of S.B.1. None is really apparent, as so many were readily apparent in *Kirkpatrick;* the appellees have not so far brought any into view. If an algebraic or combinatory topologist (and *non constat* that the Texas Legislature contained one in June, 1971) could at this late time work out a few such transfers, that fact could hardly have much meaning in evaluating a practical political process, or its outcome. Nothing in the Record here establishes or tends to establish that the county-integrity justification is in this case anything but *bona fide*. Appellant earnestly contends that it may properly be and ought to be evaluated anew in the light of this clear distinction from *Kirkpatrick*.

When it is evaluated anew, there appear several reasons why a legislature might wish to respect county lines, where possible, in constructing Congressional Districts.

First, there is the difficulty created for a county government when it must deal with two Congressmen with respect to its relations (most commonly perhaps as grant-recipient) with the national government. Every Congressman does "casework" for his constituents, including governmental units within his District. "Counties have created or expanded agencies to distribute funds under state and federal programs." Grant and Nixon, STATE AND LOCAL GOVERNMENT IN AMERICA 301 (1963) See also, Bollens, AMERICAN COUNTY GOVERNMENT 27-28 (1969). Research performed by the staff of a Texas Congressman shows that a considerable part of the case-load of some Congressmen consists in dealing with the desires and needs of county government; *Dividing Counties Between Congressional Districts* (Remarks of Hon. Bob Eckhardt, 118 CONGRESSIONAL RECORD E8217 (Sept. 28, 1972). See also a speech of Senator Edmund Muskie, *Congress and the Counties*, 31 AMERICAN COUNTY GOVERNMENT 15-18. This casework is a natural and accepted part of the function of representation, and would obviously be at its most important in rural Texas, where the county government is often the most important or the only general governmental organization on the scene. Splitting of a county between two Congressional districts plainly means a duplication of effort on the part of county officials maintaining Congressional contacts, and perhaps even some troublesome political conflict. (For growing county-federal relations, see Duncombe, COUNTY GOVERNMENT IN AMERICA 135 ff., 248 (1966).

Secondly, splitting a county between two Congres-

sional districts complicates not only the ballot but also the common political participation of residents of the county. Effective politics is a matter of alliances and groupings; these are facilitated when they can be formed for more than one purpose. This would be especially important in the many sparsely populated rural counties in Texas, where the necessity for formation of groups along multiple lines might readily exhaust the energies of the people. (On the county as unit of political organization, see Duncombe, *op. cit. supra*, 7)

Thirdly, there is a symbolic function in county-splitting. The disregard of county unity tends to downgrade the county in importance, at a time when, after long eclipse, it appears to be on the way to greater usefulness. See *Avery* v. *Midland County*, 390 U.S. 474 (1968), especially as to the "increasing importance" of the county today, 390 U.S. at 481. See also Grant and Nixon, *op. cit. supra*, 302; Duncombe, *op. cit. supra*, 28. Symbolism is beyond doubt a living part of politics; a legislature desiring to contribute to the trend noted in *Avery* might judge that both practical and symbolic reasons led to respect for county integrity in districting for Congress.

As to all three of these considerations, it is not necessary that this Court be finally convinced of their rightness. All that is necessary is that this Court recognize them as legitimate, rational legislative judgments, judgments the Legislature (on the basis of general political knowledge and feelings available to legislatures but hard to read into a judicial record) ought to be allowed to make, where, as here, the result is no more than a very small population variance. When they are viewed in this light, it is hard to see how it can be said they are unreasonable.

The smallness of the population variance is crucial. No one would contend that respect for county lines would justify a 50% variation from the "ideal". It is submitted that no one would contend that a plan was invalid which varied from "ideal" by as much as .05%, even if it were clearly proved or conceded that this happened as a result of respecting county lines. The question must not be whether county integrity is a total justification for any variation however large, nor yet whether county integrity is an inadmissible justification for any variation, however small. If neither of these extreme propositions is acceptable, then the right rule must be that respect for county integrity may justify some reasonably small variations. It is submitted that the variations in this case, aggregating at their highest 4% up and down, ought to be held reasonably justified by that respect for county integrity which, on the face of the map, evidently moved the legislature, both as a conscious motive and as a subjacent assumption. (The size of the variations clearly distinguishes *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967), where county integrity was rejected as a justification for variations aggregating some 30%, and may even in itself distinguish *Kirkpatrick*, where the aggregate variations were about half again as high as the ones in this case—though the more impressive distinction of *Kirkpatrick* lies in the proven sham character of the county-line defense in that case.)

Summary on II

Kirkpatrick, then, was a case wherein there had been found bad faith in the most classic sense—the sense, namely, of conscious and stubborn intent to perpetuate the very wrong the apportionment cases had struggled against. It was a case in which the county-integrity

justification was plainly shown to have been *mala fide*. The present case, on the other hand, is one entirely lacking any evidence (or even argumentative suggestion) of intent to wrong any section or interest; it is a case in which county integrity—the one value distinguishing S.B.1 from the zero-variation Plan B., and hence the only value legitimately to be judged as a "justification" for the variations in S.B.1—is untainted by any suggestion of bad faith.

There are other distinctions. For example, the lesser-variation House Bill in this case, was not "rejected without consideration" (394 U.S. at 532) but was a part of the input to the conference committee (A. 257-8). The overall variation in *Kirkpatrick* was nearly half again as much as the variation in this case. But the two distinctions argued above are undoubtedly the most important.

The cases are different, then, on substantial common-sense grounds. *Kirkpatrick* need not be held to rule this case. If it does not rule it, if a new look is permitted, appellant submits there is no doubt of the appropriate outcome. This case shows an *average* variation of .745%, a top-to-bottom variation of 4.1%, and a ratio of smallest to largest district of 1:1.04. Our record shows no animus and no settled bias in any direction—nothing but what seemed to all concerned a reasonable compromise. The small variations that exist are entirely attributable, as has been shown, to respect for county integrity, a value entirely sufficient to justify these very small variations. There is simply nothing in such a case which ought to lead this Court to upset the judgment of the Texas Legislature.

(It may be added that, if *Kirkpatrick*, despite the foregoing considerations, be regarded as squarely

holding that respect for county integrity may never justify any population variance, however small, then *Kirkpatrick* ought to be modified at this time, at least to the extent of altering this quite unjustifiably inflexible rule.)

III

Whatever view this Court may take as to the preceding Points, the judgment entered in the District Court must evidently be reversed, since there was no conceivable substantive warrant for that court's adoption of Plan C, and the procedure leading to that adoption was grossly defective.

Appellant earnestly contends that this Court, for the reasons already given, ought to uphold Senate Bill One and reverse this judgment on that ground. But even if this should not occur, it is submitted that the judgment below cannot stand, since the lower court's selection of Plan C is manifestly erroneous, is totally unsupported by so much as a syllable in the Record or even in plaintiff-appellees' written and oral arguments, and occurred after a period of consideration so short as to establish, in itself, the impossibility of the Plan's having been studied by the lower court with the thoroughness appropriate to so drastic and deep-cutting an incursion into Texas's political institutions.

Appellees' original complaint, filed on October 26, 1971, set forth a plan, called Plan B, which rather closely followed S.B.1, but which (by dividing some 18 counties) produced a near-zero set of district deviations from "ideal".

On January 10, 1972, after nearly all evidence in the case had been taken, appellees filed an "Amended Complaint", whereto was annexed, in addition to Plan

B, a new Plan C. This plan radically and fundamentally altered the Congressional districting of Texas, entirely disregarding the Legislature's Plan, as the latter was embodied in S.B.1. *This Plan C actually showed greater population variations than Plan B.* It was thus introduced in appellees' Amended Complaint, at p. 8 (A. 38):

> "J. That had the legislature desired to enact a statute consonant with the mandate of Article I § 2 of the U. S. Constitution, that is a plan which made each district as compact and contiguous and as nearly equal in population to each other district as practicable, taking into account solely population and not taking into account "social", "cultural", "economic" or "other factors" including preservation of incumbent congressmen, it could have enacted a plan the same as or substantially similar to that plan set forth in Exhibit C annexed hereto and herewith incorporated by reference as though set forth at length herein. That such plan is hereinafter referred to as "Plan C". That Plan C provides for districts that are significantly more compact and contiguous than those set forth in Plan A. That the population difference between the largest and smallest district proposed under Plan C is 1323 persons which is less than three tenths (3/10) of one per cent (1%) or 0.0028."

There was and is not a word in the whole Record bearing in any way on the practicality or wisdom of Plan C. (Indeed, the disclaimer just quoted of any taking account of social, cultural or economic factors, or of other factors *eiusdem generis* with these, seems to constitute, in effect, a disclaimer of wisdom; this Court has never said that the disregard of such evidently relevant factors is a constitutional requirement or even a virtue. How could it be either?)

On January 21, 1972, eleven days after the first ap-

pearance of Plan C in the case, a "trial" was held before the three-judge District Court. This "trial" actually consisted of argument, since evidence had already been taken in deposition form.

On this occasion, apellees' counsel said not one word about Plan C. On the other hand, both counsel for appellees insistently recommended the adoption of Plan B—an aggregate of six times. (A. 317, 319, 321, 322.) In these recommendations, it was stressed that Plan B followed the Legislature's general plan, while shaving down population variances. (A. 320.) (This was in fact done by cutting counties; see *supra.*, II, B.)

On this occasion, no Judge asked any questions about Plan C.

The next morning, January 22, 1972, the court reconvened and announced its judgment. The following is absolutely all that is said about Plan C (and, indeed, about the whole question of selection of a plan):

> "Defendant has not submitted any plan of reapportionment as an alternative to S.B.1. Plaintiffs have proposed two plans, B and C. Plan B is based on S.B.1, but has a significantly lower deviation than S.B.1. Plan C is based solely on population and is significantly more compact and contiguous than either S.B.1 or Plan B. The population deviation in Plan C is less than 3/10 of one percent (.0028). The Court has considered Plans B and C, as well as the plan submitted by the intervening plaintiffs, and concludes that Plan C best effectuates the principle of "one man, one vote" enunciated by the Supreme Court."

(It is to be noted that this language does not include comparison of Plan B and Plan C *as to population variance*, the only constitutional value at issue in the case; as already pointed out, Plan B was "better" than Plan C in this regard.)

Now the law of remedies in redistricting and reapportionment cases is new. The situation is not, therefore, that a long line of precedents establishes the wrongness of the step taken by the District Court. The situation is rather one which calls for this Court's establishment of minimal standards, based on principles of federalism, of due process, and of equity. The action of the court below, it is submitted, failed to rise to the minimally acceptable in at least the following respects.

First, the court below apparently conceived its duty to be merely that of selecting among plans submitted by the parties. (In effect, that meant plans submitted by plaintiffs and plaintiff-intervenors; the State's law officers up to this point had had no occasion to submit any plan, standing as they did on the position that S. B. 1 was acceptable. They would have been in violation of duty had they done so in advance of strict necessity, for the submission of such a Plan would inevitably have been construed as an offer to "settle" the case on terms short of validation of Senate Bill One, which it was their duty to defend.) In making this assumption, it is submitted, the court below grievously erred. The fact that a group of plaintiffs have convinced a court that the legislature's bill is unconstitutional is no ground whatever for the inference that any of the plans submitted by the plaintiffs is optimal or even acceptable. Practically, what this means is quite clearly that a court that had decided that S.B.1 was unconstitutional ought to have announced that conclusion and opened itself to proposals from all parties at least, and perhaps from all citizens. (The Presiding Judge at the trial below rejected the idea of appointing a master, saying, "That would be just one more idea, one more plan, one more than we have". (A. 323)

Secondly, even if the court below had been right in its assumption that it must or properly might limit itself to plans submitted by plaintiffs, it ought clearly to have selected Plan B. (*Cf. Preisler* v. *Secretary of State of Missouri*, 341 F. Supp. 1158 (W.D. Mo. 1972).) Of the plans submitted, that plan followed the Legislature's judgments on political points most closely, changing the legislative scheme only as far as was needful to reduce population variance to virtual zero. Its population variance was less than that of Plan C.

In their Motion to Dismiss Or Affirm, appellees (now in the position of having to defend the adoption of Plan C, which they never recommended) have said:

> "*The debasement of the vote is of secondary importance.* It is the calculated, foreseeable consequence of '. . . the approach to redistricting . . .' which, under all the evidence was (1) to protect incumbents (the 'incumbency factor'; or, euphemistically, 'maintenance of constituency-congressman relations'); (2) to choose who among them would be elected to fill a vacancy; and (3) to preserve geo-political lines." Motion to Dismiss or Affirm, p. 9 (Emphasis supplied).

Elsewhere in the same document they say:

> "The meritorious aspect of Plan B is that it reduced the 'top to bottom' deviation to less than one-tenth of one per cent as opposed to 4.1% as enacted by the Legislature (and 'administratively corrected'). This faithful adherence to the Legislative intent *may well have been the vice* that precluded the adoption of Plan B, even conditionally; and compelled the Court to conclude . . . 'that Plan C best effectuates the principal of "one man, one vote" enunciated by the Supreme Court.'" *Ib.*, p. 10 [Emphasis supplied]

On the startling view that emerges from a synthesis of these two passages, the small population variance, being "*of secondary importance*," simply allows a court to get its hands on the Legislature's districting plan. Having passed this jurisdictional hurdle, the court may (or even must, it would seem, if following them is a *vice*) disregard or revise all the purely prudential and political judgments of the Legislature, even when it has before its eyes a plan (in this instance Plan B) that eliminates the population disparity which was the sole constitutional evil complained of, while following the Legislature in other ways. It is simply unbelievable that this Court will sanction such a proposition as that.

Thirdly, the summary adoption of Plan C followed a process of deliberation and consideration which fell far below what ought to be required. It is ironic that the plaintiff-appellees' Brief in the court below should have contained this paragraph:

> "h. *The Legislative Process Used to Enact S.B.1 Evidences a Lack of Good Faith Effort to Draw Districts as Compact, Contiguous and Numerically Equal as Practicable.*
>
> From the outset the members of the legislature accepted and acquiesced in the idea that a conference committee would draft a bill that would pass the legislature and become the law of the State of Texas in regard to the design and implementation of the redistricting of congressional districts in this state. Committees were appointed to study this problem and their reports were sent to the respective houses where they were passed and forwarded to the conference committee.
>
> What is apparent, however, is the fact that even within the committees designing the initial bills that would go before the respective houses there was not the opportunity to examine, to study and

question, to propose and counterprose (sic) and to give just consideration to perhaps the most important piece of legislation to be enacted in that session."

What, one may ask, would appellees have said if the Legislature had appointed a three-man committee to deal with apportionment, delegating to that committee power to act, and if that committee, after being given Plan C, together with the above-quoted description thereof in the Amended Complaint, had eleven days later (without in any way so much as indicating that it was taking Plan C seriously, without hearing any testimony or in any other manner collecting data or opinion on that Plan and without giving any reasons worthy of the name) announced that Plan C was to be the plan "for the congressional districts of the State of Texas"? Yet what the court below did was even less acceptable than that, for its action not only adopted a plan without any input whatever on the wisdom of that plan, but simultaneously rejected a plan which would at least have approximated the Legislature's judgments, while serving the only constitutional value concerned somewhat better than did the adopted plan.

Appellant submits, then, that the adoption of Plan C was plainly erroneous and requires reversal. But appellant reiterates that Senate Bill One ought to be held valid, so that the present remedial question need never arise.

CONCLUSION

For the reasons given, the judgment of the court below should be reversed, and the cause remanded with directions that judgment be entered for the defendant-appellant.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas
SAMUEL D. MCDANIEL
Staff Legal Assistant
P. O. Box 12548
Austin, Texas 78711
CHARLES L. BLACK, JR.
169 Bishop Street
New Haven, Connecticut 06